

Spousal Rights and Tax-Qualified Retirement Plans

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I. INTRODUCTION

A. REA Significantly Impacted Spousal Survivorship Benefits.

The Retirement Equity Act (REA) was passed on August 23, 1984. The major intent of REA was to safeguard the rights of a participant's spouse in a qualified plan. The method utilized to achieve this goal is to require the spouse to make an election if a pension plan is to pay benefits in a form other than a joint and survivor annuity.

B. REA Amended ERISA to Permit Accrued Benefits to Be Taken into Account in Divorce Settlements.

To the extent that a plan account is or could be in pay status, REA allows benefits to be paid to a former spouse or a child pursuant to a Qualified Domestic Relations Order (QDRO). In this respect, REA has left the plan administrator in several quandaries: What if the plan administrator believes that a domestic relations order does not comply with federal law and, therefore, is not "qualified?" In the event that such an order is not qualified but the plan administrator nevertheless obeys it, he has breached his fiduciary duties and could jeopardize the tax-qualified status of the plan. If the plan administrator fails to comply with such an order, however, the state court could hold him in contempt. If a domestic relations order is not qualified, the plan administrator is obligated to so inform the plan participant or his attorney.

II. IMPACT OF REA ON ELIGIBILITY AND VESTING REQUIREMENTS

A. REA Lowered Age Requirement for Eligibility. I.R.C. § 410(a)(1).

A plan can only exclude employees who are under the age of twenty-one.

B. REA Lowered Age Requirements for Years Taken into Consideration for Vesting. I.R.C. § 411(a)(4).

REA requires that years of service starting with age eighteen must be taken into account for vesting purposes.

C. REA Impacts Years to Be Counted for Breaks in Service. I.R.C. § 410(a)(5).

1. A participant does not incur a break in service for purposes of vesting or eligibility unless his consecutive number of one-year breaks in service equals or exceeds the greater of five or the number of pre-break years of service. I.R.C. § 411(a)(6)(D).
2. However, if the plan provides for two-year eligibility and 100% vesting after two years of service, the plan can disregard any Years of Service before the break for eligibility purposes if the participant was not vested prior to the one-year break. I.R.C. § 410(a)(5)(B).

Example.

- a. 1994—1000 hours
1995— 550 hours
1996—1000 hours

Eligibility completed in 1996.

- b. 1994—1000 hours
1995— 450 hours
1996—1000 hours
1997—1000 hours

Since the Break in Service in 1995 caused 1994 to be disregarded, eligibility is completed in 1997.

3. A participant who works less than 501 hours in a year incurs a break in service. I.R.C. § 411(a)(6)(A). If a participant works more than 500 hours but less than 1000 hours, the participant neither incurs a break in service nor accumulates a year of service for eligibility or vesting purposes. However, a participant who is either on maternity or paternity leave is deemed to have worked at least 501 hours for purposes of determining a break in service for at least one plan year. I.R.C. § 410(a)(5)(E).
4. Maternity and paternity leave.

For purposes of determining whether a break in service has occurred for participation and vesting purposes, an individual is deemed to have completed hours of service for periods of absence from work due to (1) the pregnancy of the individual; (2) the birth of a child of the individual; (3) the adoption of a child by an individual; or (4) caring for a child during the period immediately following the birth or adoption. During the period of absence, the individual is treated as having completed (1) the number of hours that would normally have been credited but for the absence; or (2) if the normal work hours are unknown, eight hours of service for each normal workday during the leave. The total number of hours of service required to be credited for any period shall not exceed 501 hours. The hours of service must be credited only (1) in the year in which the absence begins for one of the

permitted reasons, if the crediting is necessary to prevent a break in service in that year; or (2) in the following year. *In summary*, a one-year maternity or paternity leave will not result in a break in service. I.R.C. § 410(a)(5)(E).

III. SPOUSE'S RIGHTS TO RETIREMENT BENEFIT AND ANNUITY REQUIREMENTS

A. Introduction.

1. The intent of REA was to protect spousal rights to a portion of the benefit in the event of divorce or death.
2. REA recognizes the spouse's right to at least fifty percent of the benefit by requiring that a plan (excluding a profit-sharing or stock bonus plan that does not contain contributions from a pension plan, does not provide any benefits in the form of an annuity, and provides for a 100% death benefit payable to the spouse) pay death or retirement benefits in the form of a "qualified" annuity. I.R.C. § 401(a)(11). There are no REA spousal rights in IRAs, SEPs or SIMPLE IRAs.
3. Pension Protection Act of 2006 (PPA) Additional Annuity Options. Effective for plan years commencing on or after January 1, 2007, retirement plans with annuity options are required to offer alternative spousal annuities in addition to the normal form of a qualified joint and survivor annuity (QJSA) under the plan.
 - a. Plans offering a 50% QJSA must also offer a 75% QJSA option.
 - b. Plans offering a 75% or greater QJSA option must also offer a 50% QJSA option.
4. PPA extends time period to provide payment elections.
 - a. Effective for plan years commencing after December 31, 2007, plans may provide participants with payment elections during the period of 30 to 180 days prior to the payment commencement date.
 - b. Prior to PPA, this time period was 30 to 90 days before the scheduled payment date.
5. These spousal rights are presumed by law and, therefore, the spouse as well as the participant must make an affirmative election not to receive such an annuity. The spouse's election must be witnessed by either a notary public or a plan representative. IRS Notice 97-10 provides sample language designed to make it easier for spouses to understand their rights to survivor annuities under qualified plans.

6. Spousal rights go beyond death and retirement benefits. They have an impact on divorce settlements as well as the participant's right to receive a loan from a plan if the loan is secured by his accrued benefit.
 7. The IRS has ruled that state "killer laws" override the requirements for spousal death benefits under I.R.C. §§ 401(a)(11) and 417. If a participant is killed by his spouse and state law prohibits a killer from inheriting benefits from the person killed, such law also applies to pension benefits. PLR 8908063.
 8. The REA survivorship rules cannot be waived in a prenuptial agreement, since the waiving party is not a "spouse".
 9. Benefits paid to a surviving spouse in the form of an eligible rollover distribution (under I.R.C. § 402(c)(4)) may be rolled over to an IRA or to a qualified plan. I.R.C. § 402(c)(9).
- B. Qualified Pre-Retirement Survivor Annuity (QPSA) I.R.C. § 417(c).
1. Unless the participant and spouse elect otherwise, REA requires that a death benefit be paid to the spouse in the form of a QPSA.
 2. The amount of the QPSA equals:
 - a. Fifty percent of the benefit that the participant would have received under a Qualified Joint and Survivor Annuity (QJSA) (*i.e.*, the survivor portion);
 - b. In the case of a participant who dies after being eligible for retirement this amount is determined as if the participant retired on the day prior to his or her death and elected to receive his benefit in the form of a QJSA;
 - c. In the case of a participant who dies prior to being eligible for retirement, this amount is determined by assuming that the participant terminated employment, lived to the earliest retirement date under the plan and elected to receive a QJSA on the retirement date.
 - d. Thus, in the case of a *defined contribution* plan, the QPSA is an annuity which is equal to one-half of the participant's accrued benefit. In the case of a *defined benefit* plan, the QPSA is the actuarial equivalent of the survivor portion of a QJSA. Any death benefit not subject to the QPSA rules may be paid to the participant's designated beneficiaries.
 3. Assuming that the plan provides for a full 100% death benefit, the remainder of the participant's benefit may be paid to his beneficiary, who may or may not be his spouse if the plan so provides. Although the law only requires that a surviving spouse receive 50% of the deceased participant's accrued benefit, many plans provide that the

spouse will receive 100% of the accrued benefit unless there is a spousal waiver.

4. If the spouse desires to receive the full death benefit in the form of a lump-sum, assuming that the plan provides for lump-sum distributions, the spouse must elect out of the QPSA and the participant must designate the spouse as the sole beneficiary.
5. A plan may provide that a spouse who has been married to the participant for less than one year is not given the automatic right to either a QPSA or a QJSA. The one-year period ends at the time of the participant's death. I.R.C. § 417(d).
6. After a participant attains age thirty-five, any prior election made in a previous plan year becomes invalid. Furthermore, an election of a previous spouse has no effect on the rights of a subsequent spouse. Also, in the case of a participant who separates from service, the election period for termination benefits begins no later than the date of the separation from service. I.R.C. § 417(a)(1).
7. Although the wording of the statute requires that the election out of the QPSA be made prior to the participant's death, the IRS has taken the position that the failure to make such an election would not preclude the spouse from electing out of the annuity benefit and receiving a lump-sum distribution after the participant's death.
8. These requirements apply to all pension (defined benefit or defined contribution) plans and to profit-sharing plans which: (a) contain contributions from a pension plan; (b) do not provide for the payment of death benefits to the surviving spouse equal to the participant's vested accrued benefit; or (c) offer annuities as a benefit payment option. I.R.C. § 401(a)(11)(B)(iii).
9. If a profit-sharing plan does provide for such a death benefit, the spouse by law is considered to be the primary beneficiary. Thus, the spouse would have to sign a waiver before the funds could be paid to someone else designated as the primary beneficiary.
10. If a participant's vested accrued benefit does not exceed \$5000, a lump-sum payment can be made in lieu of an annuity without the consent of the participant or his spouse. I.R.C. § 417(e)(1).
11. Although the plan can require the spouse's election to be irrevocable, the participant can always revoke his election. An election made without the spouse's consent will only be valid if the plan representative can satisfactorily establish that there is no spouse or that the spouse cannot be located.
12. A spousal rights waiver contained in an antenuptial agreement or similar contract entered into prior to marriage does not satisfy the spousal consent requirements. Treas. Reg. § 1.401(a)(20), Q&A-28.

13. The participant and spouse should elect out of QJSA or QPSA if:
 - a. The spouse would prefer to receive survivor benefits in a form other than QPSA;
 - b. The beneficiary will be someone other than the spouse (for portion of benefit covered by QPSA); or
 - c. For retirement (non-death) benefit, the participant and spouse desire to receive benefits in a form other than a QJSA.
14. Spousal rights summary.
 - a. Pension plan (defined benefit or defined contribution).

Spouse has right to benefits paid to participant prior to death and is entitled to fifty percent of benefits at participant's death.
 - b. Profit-sharing plan.

Spouse has no right to benefits paid to participant prior to death but is entitled to 100% of benefits at participant's death.

C. Qualified Joint and Survivor Annuity (QJSA).

1. This is an annuity paid over the joint lives of the participant and the participant's spouse upon the participant's retirement. The survivor annuity is paid over the life of the spouse, and must be at least the actuarial equivalent of one-half of the annuity payable over the joint lives of the participant and the spouse.
2. The election period to waive a QJSA is the ninety-day period ending on the annuity starting date.
3. A plan can fully fund a QJSA in order to provide for payments to the spouse after the participant's death up to the § 415(b) limitation (*i.e.*, the lesser of 100% of compensation or \$160,000 per year (as adjusted, \$185,000 for 2008)).

D. Prenuptial Agreements.

1. An agreement entered into prior to marriage does not satisfy the consent requirement. Treas. Reg. § 1.401(a)-20, Q&A 28.
2. Courts have held the purported waiver to be invalid because the agreement was not signed by the participant's "spouse" since the agreement did not acknowledge the effect of the waiver. *Hurwitz v. Sher*, 982 F.2d 778 (2d Cir. 1992).
3. The 6th Circuit Court of Appeals ruled that a prenuptial agreement by itself cannot satisfy ERISA spousal-consent requirements for spousal waiver of ERISA retirement plan death benefits. *Greenbaum, Doll*

and *McDonald, PLLC v. Sandler*, 6th Cir, No. 06-6494, unpublished (12/3/07)

4. One court ruled that the surviving spouse could be required to pay plan benefits to the deceased spouse's estate if the surviving spouse had refused to sign a spousal consent form required by the antenuptial agreement. *Callahan v. Hutsell, Callahan & Buchino PSC Revised Profit-Sharing Plan*, 14 F. 3d 600 (6th Cir. 1993).
5. The U.S. Court of Appeals for the Eleventh Circuit held that the surviving spouse of a participant in a tax-qualified retirement plan did not legally waive her rights to her deceased husband's plan benefits because her waiver did not comply with the statutory requirements that her consent and waiver be witnessed by a plan representative or a notary public. *Lasche v. George W. Lasche Basic Profit-Sharing Plan*, 111 Fed. 3d 863 (11th Cir. 1997). The Eleventh Circuit held that the statutory requirements for spousal waiver controlled and disagreed with arguments that the parties intent, as demonstrated by a prenuptial agreement, an amendment to such agreement and the spouse's signature on the beneficiary designation form should be considered in determining whether a valid waiver took place.

E. Spousal Beneficiaries and Divorce.

1. In *Kennedy v. DuPont*, 129 5. Ct. 865 (2009) the U.S. Supreme Court held that where the divorced former spouse of a plan participant waives her spousal interest in the participant's pension plan, the waiver, has no effect on an existing beneficiary designation in her favor.
 - a. The divorce decree provided that the spouse was waiving her rights to the retirement plan but it was not qualified as a QDRO.
 - b. When the participant died, the former spouse was still the designated beneficiary.
 - c. The Supreme Court held that because the purported state law waiver in the divorce decree was inconsistent with the terms of the plan, which required payment to be made to the deceased participant's designated beneficiary, and because of ERISA preemption, DuPont had properly discharged its duty by paying the account to the former spouse as the designated beneficiary.
 - d. Plan document rule. ERISA requires that plans be administered in accordance with their terms. State court decrees cannot be considered and plans are bound by the written beneficiary designation form on file.

2. Several states, including Ohio, have enacted statutes stating that, upon divorce, a beneficiary designation naming the (now former) spouse is automatically revoked unless the divorce decree specifically provides otherwise. The Ohio statute applies to life insurance policies, annuities, payable on death accounts, IRAs, employer death benefit plans and other rights to receive death benefits arising under a contract. Ohio Rev. Code § 1339.63.
 - a. The U.S. Supreme Court has held that such state laws are preempted by ERISA. The U.S. Supreme Court held that ERISA preempts a Washington law that generally invalidates, at the time of divorce, a beneficiary designation in favor of a former spouse. The court held that ERISA preempted the Washington law and the plan benefits were required to be paid to the designated beneficiary, regardless of whether she was a former spouse. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).
 - b. Since state and local government retirement plans are not subject to ERISA, a state statute revoking a beneficiary designation naming a former spouse would apply to such plans.
3. U.S. Sixth Circuit Court of Appeals Disregards Pension Plan Choice of Law Provisions to Decide Surviving Spouse Issue.

In *Daimler Chrysler v. Durden*, 05-1662 (6th Cir. May 26, 2006), a participant named spouse #2 as a beneficiary under his employer's pension plan. After the participant's death, both spouse #1 and spouse #2 claimed that they were the surviving spouse and entitled to the survivor benefits under the pension plan. The pension plan provided that it would be "construed, governed and administered in accordance with the laws of the State of Michigan except where otherwise required by Federal law."

The lower court enforced the choice of law provision, and applied Michigan law. A divided Sixth Circuit reversed and applied Ohio law, which was where the participant had lived during the existence of both relationships and where the participant was "married" to spouse #2. Holding in favor of spouse #1, the Sixth Circuit relied on the Restatement (Second) of Conflict of Laws, Section 187, in making its determination that it should disregard the choice of law provision contained in the Pension Plan. The Sixth Circuit further noted that the provisions of ERISA itself make it necessary to determine which claimant is the surviving spouse without reference to the Plan documents.

IV. QUALIFIED DOMESTIC RELATIONS ORDERS. I.R.C. § 414(p); ERISA § 206(d)(3)

A. Pension Protection Act of 2006 ("PPA") Clarification of QDRO Issues.

The Department of Labor ("DOL") published interim final regulations on qualified domestic relations orders ("QDRO"), as required by the PPA. The regulations, which are effective April 6, 2007, clarify certain issues relating to the timing and order of a QDRO.

1. Under the regulations, a domestic relations order ("DRO") that otherwise satisfies the requirements of a QDRO will not fail to be treated as a QDRO solely because the DRO is issued after, or revises another, QDRO. The DOL provides two examples of permissible "subsequent" QDROs:

a. Participant and spouse divorce and submit a DRO to the plan administrator, which is approved as a QDRO. Subsequently, before payment under the QDRO commences, the parties submit a second DRO that assigns a smaller portion of the benefit to spouse. The second DRO will not fail to be a QDRO solely because it reduces the amount payable under the first QDRO.

b. Participant and spouse one divorce. A QDRO is entered for spouse one. Participant remarries and then divorces spouse two. A DRO assigning spouse two a portion of participant's benefit that was not already assigned to spouse one will not fail to be a QDRO solely because it was issued after an earlier QDRO.

2. The regulations also provide a DRO that otherwise satisfies the requirements of a QDRO will not fail to be treated as a QDRO solely because of the time at which it was issued. The DOL provided three examples:

a. Participant and spouse divorce and submit a DRO to the plan administrator. The DRO is defective (*i.e.*, it does not qualify as a QDRO). Before the parties can submit a revised DRO to the administrator, the participant dies. The revised DRO will not fail to be a QDRO solely because it was issued after the participant dies.

b. Participant and spouse divorce and submit a DRO requiring the former spouse to be treated as the surviving spouse for purposes of the plan's death benefit. The DRO will not fail to be a QDRO solely because the former spouse no longer satisfies the plan's definition of surviving spouse.

c. Participant retires and elects a straight life annuity. The spouse consents to the election and waives his or her surviving spousal

rights. Participant and spouse then divorce and submit a DRO assigning half of participant's future benefits to spouse. The DRO does not fail to be a QDRO because it was issued after the annuity starting date.

3. To illustrate the rule that plan administrators should apply the same requirements and protections to subsequent orders, an example in the regulations addresses the 18-month segregation period required by ERISA. While the plan administrator is determining the qualified status of an order and for a period of up to 18 months, the administrator must separately account for the benefits that would be payable to the alternate payee if the order is qualified. The regulations direct that, where the plan receives a revised order more than 18 months after the first order, the plan administrator should launch a new 18-month segregation period. The 18-month period applies per order, not per situation.

B. ERISA Preempts State Domestic Relations Laws.

ERISA preempts state domestic relations laws insofar as they pertain to qualified plans and provides for procedures in complying with a domestic relations order (which must be “qualified”).

1. REA amended ERISA to specifically preempt a domestic relations order pursuant to state law which pertains to a qualified plan. ERISA § 514(b)(7). A plan trustee or representative is prohibited from complying with a non-qualified domestic relations order. Compliance with such an order could invoke sanctions such as breach of fiduciary duty and plan disqualification. The latter could have adverse tax consequences for both the employer and the employees. ERISA § 104(d).
2. A domestic relations order ("DRO") is a judgment, decree, order or property settlement made pursuant to state domestic relations law which pertains to a marital property settlement, child support, alimony or child custodial rights. I.R.C. § 414(p)(1)(B).
3. 1989 OBRA extended QDRO procedures to Government and Church Plans (as defined in I.R.C. §§ 414(d) and 414(e) respectively). I.R.C. § 414(p)(11).
4. In order for a domestic relations order to be qualified, it must:
 - a. Recognize the right of an alternate payee (*i.e.*, spouse, former spouse, child or dependent recognized by the domestic relations order) to receive all, or a portion, of the participant's benefits under the plan;
 - b. Clearly specify the names and last known addresses of the alternate payees and the participant;

- c. Clearly specify the amount and/or percentage of payments to be made out of the participant's accrued benefit as well as the method (including number of) payments; and
 - d. Clearly specify the plan or plans for which the order applies. An order directed at "each pension plan of any employer in which the employee participates" is not a *qualified* domestic relations order. *See* I.R.C. §§ 414(p)(2)(A-D).
5. Alternate payee defined.
- a. A QDRO can only grant benefits in favor of an alternate payee. The term "alternate payee" means any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant. I.R.C. § 414(p)(8).
 - b. In DOL Advisory Opinion 2002-03A (6/7/2002), the Department of Labor (DOL) ruled that a governmental agency (e.g., CSEA) may receive a QDRO payment on behalf of an alternate payee. The DOL stated that although the Mississippi Division of Child Support Enforcement could not be considered to be an alternate payee, payments could be made to the agency on behalf of an alternate payee.
6. QDROs specifically apply to retirement plans. The U.S. Supreme Court has held, however, that an ERISA Welfare plan may be subject to a state garnishment order. *Mackey v. Lanier Collection* 486 U.S. 825 (1988).
7. In PLR 200252093 the IRS ruled that an assignment of a participant's retirement account under a QDRO to secure the participant's non-retirement plan obligations to a former spouse is permitted under IRC § 401(a)(13)(B). The QDRO must be presented to the plan in order to create a valid security interest.

C. Limitations on a QDRO.

- 1. A domestic relations order is not qualified if it conflicts with the terms of the plan. I.R.C. § 414(p)(3).
 - a. If the plan provides for a specific type or form of benefit, the order cannot require the plan to provide for a different benefit. If it does, then it is not qualified.
 - b. The order can neither require the plan to increase benefits nor change actuarial assumptions.

- c. The order cannot supersede the rights of another alternate payee pursuant to a previous QDRO.
 - d. Unless the plan provides for early retirement benefits, the QDRO cannot require it to do so.
 - e. The QDRO cannot require the payment of a participant's benefit to a spouse or former spouse of the participant's former spouse. Furthermore, benefits cannot be paid to an alternate payee in the form of a joint and survivor annuity over the lives of such payee and a new spouse—notwithstanding the plan's joint and survivor annuity requirements.
2. A QDRO can require payment of early retirement benefits under a plan which provides such benefits.
- a. If the participant has not separated from service, the QDRO can require payments on the date that the participant obtains—or would have obtained—the earliest retirement age under the plan. IRC § 414(p)(4) defines "Earliest Retirement Date" as the earlier of:
 - i. the date on which the participant is entitled to a distribution under the plan, or
 - ii. the later of:
 - (I) the date the participant attains age 50, or
 - (II) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.
 - b. If the participant is in "in pay" status or has attained the early retirement date under the plan, the QDRO can provide for immediate payment of benefits as if the participant had retired on that date. However, only the present value of the benefit actually accrued can be taken into consideration.
 - i. For defined benefit plans, the present value is to be determined by the interest rate in the plan.
 - ii. When payments begin as such pursuant to the QDRO, future accrued benefits are not to be reflected in payments to the alternate payee.

D. QDRO and the Applicability of Conflicting Rules.

- 1. Current distributions to an alternate payee pursuant to a QDRO will not disqualify the plan or result in the imposition of penalties which would otherwise be imposed.

- a. This exception applies only if the plan could pay benefits to the participant if such participant were eligible for early or normal retirement under the plan.
 - b. A plan may provide that benefits can be paid to an alternate payee under a QDRO although a participant is not in pay status.
 - c. No violation for in-service distributions under Reg. § 1.401-1(b)(1)(i).
 - d. Would not cause a cash or deferred arrangement pursuant to I.R.C. § 401(k) to lose its qualification status.
2. A QDRO may conflict with a subsequent spouse's rights to a portion of a participant's retirement benefit under REA. I.R.C. § 414(p)(5).
 - a. REA indicates that a QDRO could require the former spouse to be treated as the survivor for purposes of the participant's survivorship benefits.
 - b. This is only an optional requirement, and a domestic relations order could be "qualified" without it.
 - c. Thus, it would appear that a QDRO could defeat a subsequent spouse's survivorship right under the plan.
 3. Payments to an alternate payee before the participant or the alternate payee attain age 59½ do not result in the imposition of the 10% premature distribution penalty. I.R.C. § 72(t)(2)(C).
- E. Section 401(a)(9) Rules Applicable to QDROs.
1. The measuring lives for a § 401(a)(9) life-expectancy distribution are the participant's and the ex-spouse's.
 2. If a separate account (or segregated share of an annuity) is set aside under the QDRO for the alternate payee, distribution from that separate account must, independently of any other account of the participant, satisfy the minimum distribution rules of § 401(a)(9).
- F. Procedures for Dealing with a QDRO.
1. Plan administrator's duties upon receipt of QDRO. I.R.C. § 414(p)(6).
 - a. REA requires each plan to establish reasonable procedures to determine whether a Domestic Relations Order is qualified, and to implement the QDRO.
 - b. Upon receipt, the plan administrator must notify the participant or any alternate payees that the QDRO was received. Furthermore, the plan administrator must notify these parties of

the plan's procedures for determining whether the Domestic Relations Order is qualified.

- c. If the plan administrator determines that the Domestic Relations Order is not qualified, he should notify the parties accordingly. Furthermore, the plan administrator might be required to reevaluate that Domestic Relations Order.

2. Disputes pertaining to a QDRO. I.R.C. § 414(p)(7).

- a. Certain assets are to be segregated during the determination period.

- i. If determination is being disputed, the plan administrator is to segregate the assets pertaining to the Domestic Relations Order.

- ii. The segregated assets are those that would be paid to the alternate payee.

- iii. Assets may be put either in escrow or in a separate account of the trust.

- iv. After an eighteen-month period, the plan administrator must pay these assets either back to the plan or to the person entitled to them if he determines that the order was not qualified.

- v. If a new Domestic Relations Order is received which is determined to be qualified, the QDRO would only apply to prospective benefits.

- b. In summary, if there is a dispute regarding the validity of a domestic relations order, the plan administrator should not pay the disputed benefits to either of the parties until the dispute is resolved or for 18 months, whichever occurs first.

- c. However, a pension plan may violate ERISA if it has an informal practice of placing a hold on a participant's account *prior to* receiving a court order requiring payment to the participant's ex-spouse. *Schoomaker v. Employee Savs. Plan of Amoco Corp. and Participating Co.* (7th Cir. Mar. 1, 1993).

3. Payment of legal and other expenses associated with QDRO.

The Department of Labor previously ruled 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 of the status of a domestic relations order or administration of a QDRO constitutes an impermissible encumbrance on the exercise of the right of an alternate payee, under Title I of ERISA, to receive benefits under a QDRO. Additionally, in the view of the Department of Labor, because

Title I of ERISA imposes specific statutory duties on plan administrators regarding QDRO determinations and the administration of QDROs, reasonable administrative expenses incurred by the plan may not be allocated to the individual participants and beneficiaries affected by the QDRO. Department of Labor Advisory Opinion 94-32A (Aug. 4, 1994).

In FAB 2003-3, the DOL reversed its position and stated that QDRO charges may be assessed against the benefits of the individual's account to which the QDRO applies. Any offset policy must be explained (e.g., in the SPD) to participants in advance before any such offset can occur.

G. Tax Effects of a QDRO Distribution.

1. General rules pertaining to distribution from a qualified plan or an annuity are applicable. I.R.C. §§ 402(a)(1); 72.
2. Ten percent additional tax for distributions prior to age 59½ not applicable when QDRO requires that a distribution be made to an alternate payee. I.R.C. § 72(t)(2)(C).
3. Taxation and rollovers.
 - a. Distributions to an alternate payee spouse or former spouse pursuant to a QDRO are taxable to such spouse or former spouse. I.R.C. § 402(e)(1)(A).
 - b. Alternate payee spouse or former spouse is eligible for five-year averaging or capital gain treatment. I.R.C. § 402(e)(1)(A).
 - c. An alternate payee who is a spouse or former spouse may rollover an eligible rollover distribution to an IRA or to another qualified plan and is subject to the twenty percent withholding rules. I.R.C. § 402(e)(1)(B).
 - d. The transfer of a portion of an individual's IRA to a former spouse's IRA pursuant to a QDRO does not constitute a distribution to the former spouse but, rather, constitutes a non-taxable transfer under § 408(d)(6). PLR 9006066.
4. Nonspouse alternate payee.
 - a. Citing I.R.C. § 402(e)(1)(A), the U.S. Tax Court held that a distribution to a nonspouse alternate payee is taxable to the participant. *Stahl v. Commissioner*, U.S. Tax Court (T.C. Memo 2001-22). The Tax Court stated that the participant can escape taxation on a plan distribution only if it is paid to an alternate payee spouse or former spouse. Since the distribution was made to an alternate payee daughter it was taxable to the participant.

- b. Distributions to a nonspouse alternate payee cannot be rolled over by the alternate payee. Because the distribution to a nonspouse alternate payee is includible in the gross income of the participant under I.R.C. § 402(e)(1)(A), no part of such distribution may be rolled over by the nonspouse alternate payee. IRS Notice 89-25, Q & A3.
- c. Nonspouse alternate payees are not permitted to rollover distributions to IRAs and, therefore, distributions to such alternate payees are not subject to twenty percent withholding rules. I.R.C. § 402(e)(1)(B).

H. The Effect of Bankruptcy on a QDRO.

The U.S. Sixth Circuit Court of Appeals ruled that pension benefits awarded to a participant's ex-wife before the participant filed for bankruptcy do not constitute property of the participant's bankruptcy estate and, therefore, the debtor cannot discharge the payment obligation. *McCaferty v. McCaferty* (6th Cir. No. 95-3919, 9/18/96). The Sixth Circuit held that the divorce decree created a constructive trust to protect the ex-wife's separate interest in the pension even though the divorce decree did not use the words "constructive trust."

The Sixth Circuit opinion was consistent with the ruling of the Ohio Supreme Court in *Erb v. Erb*, 75 Ohio St. 3d 18 (1996). In *Erb*, the Ohio Supreme Court ruled that the wife's separate property interest in the husband's pension would neither be part of the husband/participant's bankruptcy estate nor be subject to the jurisdiction of the bankruptcy court.

QDRO REQUIREMENTS CHECKLIST I.R.C. § 414(p)

Plan _____
Participant _____
Date _____

1. Name/address (last known) of the participant.
2. Name/address of the alternate payee.
3. Amount or percentage of the participant's benefit payable to the alternate payee *or* the manner in which the amount is to be determined.
4. The number of payments or period to which this QDRO applies.
5. Each plan to which this QDRO applies (each plan must be specifically identified).
6. The QDRO cannot require the plan to provide benefits not otherwise provided for under the plan.
7. The QDRO cannot require the plan to provide an increase in benefits.
8. The QDRO cannot require the alternate payee to pay another alternate payee.
9. An alternate payee is a spouse, former spouse, child or dependent (*e.g., not* county children's services agency or a court).
10. The order is a judgment, decree or order.
11. The order is issued by a court of competent jurisdiction and is signed by the judge.
12. The order clearly relates to child support, alimony or division of marital property rights.

QUALIFIED DOMESTIC RELATIONS ORDER ADMINISTRATIVE PROCEDURES

Qualified Domestic Relations Order: A Qualified Domestic Relations Order (QDRO) shall be determined in accordance with the following provisions:

- (A) *Specific Requirements of QDRO:* A Qualified Domestic Relations Order shall specifically state all of the following in order to be deemed a QDRO: (1) the name and last known mailing address (if any) of the participant and of each alternate payee covered by the order. However, if the QDRO does not specify the current mailing address of the alternate payee, but the plan administrator has independent knowledge of that address, the QDRO will still be valid; (2) the dollar amount or percentage of the participant's benefit to be paid by the plan to each alternate payee, or the manner in which the amount or percentage will be determined; (3) the number of payments or period for which the order applies; and (4) the specific plan (by name) to which the order applies. The order shall not be deemed a QDRO if it requires the plan to provide any type or form of benefit, or any option not already provided for in the plan, or increased benefits, or benefits in excess of the participant's vested rights, or payment of benefits to an alternate payee which are required to be paid to another alternate payee under another QDRO.

- (B) *Administrator Must Seek Opinion of Counsel:* Promptly upon receipt of a domestic relations order which may or may not be "Qualified," the plan administrator shall notify the participant and any alternate payee(s) named in the order of such receipt. The plan administrator shall then forward the order to the plan's legal counsel or to trustee's legal counsel for an opinion as to whether the order is in fact "Qualified" as defined in § 414(p) of the Internal Revenue Code (Code). Within a reasonable time after receipt of the order, not to exceed sixty days, the plan's legal counsel or trustee's legal counsel shall make a determination as to its "Qualified" status and so inform the plan administrator who shall promptly notify the participant and any alternate payee(s) in writing of the determination.

- (C) *Disputed Orders:* If the "Qualified" status of the order is in question, there will be a delay in any payout to any payee including the participant, until the status is resolved. In such event, the plan administrator shall segregate the amount that would have been payable to the alternate payee(s) if the order had been deemed a QDRO. If the order is not qualified, or the status is not resolved (for example, it has been sent back to the Court for clarification or modification) within eighteen months beginning with the date the first payment would have to be made under the order, the plan administrator shall pay the segregated amounts plus interest to the person(s) who would have been entitled to the benefits had there been no order. If a determination as to the qualified status of the order is made after the eighteen-month period, then the order shall only be applied on a prospective basis. If the order is determined to be a QDRO, the participant and alternate payee(s) shall again be notified promptly after such determination. Once an order is deemed a QDRO, the plan administrator shall pay to the alternate payee(s) all the amounts due under the QDRO, including segregated amounts plus interest which may have accrued during a dispute as to the order's qualification.

- (D) *Qualified Domestic Relations Order Distribution.* All rights and benefits, including elections, provided to a participant in this plan shall be subject to the rights afforded to any alternate payee under a QDRO. Furthermore, a distribution to an alternate payee shall be permitted if such distribution is authorized by a QDRO, even if the affected participant has not separated from service and has not reached the “earliest retirement age” under the plan. For the purposes of this section, “alternate payee,” “qualified domestic relations order” and “earliest retirement age” shall have the meaning set forth under Code § 414(p).

**MODEL QDRO FOR
DEFINED CONTRIBUTION PLAN**

IN THE COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
_____ COUNTY, OHIO

_____)	CASE NO. _____
)	
Plaintiff)	JUDGE _____
)	
vs.)	QUALIFIED DOMESTIC
)	RELATIONS ORDER
_____)	
)	
Defendant)	

1. Effect of This Order as a Qualified Domestic Relations Order: This Order creates and recognizes the existence of an Alternate Payee's right to receive a portion of the Participant's benefit payable under an employer sponsored defined contribution plan which is qualified under Section 401 of the Internal Revenue Code (the "Code") and the Employee Retirement Income Security Act of 1974 ("ERISA"). It is intended to constitute a Qualified Domestic Relations Order ("QDRO") under Section 414(p) of the Code and Section 206(d)(3) of ERISA.

2. Participant Information: The name, last known address, birth date, and Social Security Number of the Plan Participant is:
Name: _____
Address: _____
Birth Date: _____
Social Security No: _____

3. Alternate Payee Information: The name, last known address, birth date, and Social Security Number of the "Alternate Payee" is:
Name: _____
Address: _____
Birth Date: _____
Social Security No: _____

The Alternate Payee shall have the duty to notify the Plan Administrator in writing of any changes in *his/her* mailing address subsequent to the entry of this Order.

4. Plan Name: The name of the Plan to which this Order applies is the _____ (hereinafter referred to as "Plan"). Further, any successor plan to the Plan or any other Plan(s), to which liability for provision of the Participant's benefits described below is incurred, shall also be subject to the terms of this Order.

Any changes in Plan Administrator, Plan Sponsor, or name of the Plan shall not affect Alternate Payee's rights as set forth under this Order.

5. Pursuant to State Domestic Relations Law: This Order is entered pursuant to the authority granted in the applicable domestic relations laws of the State of Ohio.
6. For Provision of Marital Property Rights: This Order relates to the provision of marital property rights and/or spousal support to the Alternate Payee as a result of the Order of Divorce between Participant and Alternate Payee.
7. Amount of Alternate Payee's Benefit: This Order assigns to Alternate Payee an amount equal to _____ percent (____%) of the Participant's total Account Balance accumulated under the Plan as of _____, _____ (or the closest valuation date thereto), plus any interest and investment earnings or losses attributable thereon for periods subsequent to _____, _____, until the date of total distribution. Further, such Total Account Balance shall include all amounts maintained under all the various accounts and/or subaccounts established on behalf of the Participant. Such _____ percent (____%) amount awarded to the Alternate Payee equals _____ Dollars (\$_____).

Such Total Account Balance shall be determined without regard to any account reduction caused by the Participant's prior loan(s), if any, from the Plan. Further, such Account Balance shall include all amounts (including plan forfeitures, if applicable) contributed to the Plan on behalf of the Participant after _____, _____ that are attributable to periods prior to such date.

In the event the Alternate Payee does not elect an immediate distribution, *his/her* share of the benefits described above shall be segregated and separately maintained in Account(s) established on *his/her* behalf and shall additionally be credited with any interest and investment income or losses attributable thereon from _____, _____, until the date of total distribution to the Alternate Payee. The Alternate Payee's portion shall be proportionately divided among the investment funds as the Participant's account(s) are allocated as of the date the Order becomes qualified.

8. Commencement Date and Form of Payment to Alternate Payee: If the Alternate Payee so elects, *he/she* shall be paid *his/her* benefits as soon as administratively feasible following the date this Order is approved as a QDRO by the Plan Administrator, or at the earliest date permitted under the Plan or Section 414(p) of Internal Revenue Code, if later. Benefits will be payable to the Alternate Payee in any form or permissible option otherwise available to participants and alternate payees under the terms of the Plan, including, but not limited to, a single lump sum cash payment.

In the event the Alternate Payee commences *his/her* benefits in the form of a monthly annuity, if such form of payment is available, *his/her* benefit are to be based on the life expectancy of such Alternate Payee.

9. Alternate Payee's Rights and Privileges: On and after the date this Order is deemed to be a Qualified Domestic Relations Order, but before the Alternate Payee receives *his/her* total distribution under the Plan, the Alternate Payee shall be entitled to all of the rights and election privileges afforded to Plan beneficiaries, including, but not limited to, the rules regarding the right to designate a beneficiary for death benefit purposes and the right to direct Plan investments, only to the extent permitted under provisions of the Plan.
10. In the event of the Alternate Payee's death prior to receiving the full amount of benefits called for under this Order and under the benefit option chosen by the Alternate Payee, such Alternate Payee's beneficiary(ies), as designated on the appropriate form provided by the Plan Administrator, shall receive the remainder of any unpaid benefits under the terms of this Order.
11. Death of Participant: In the event the Participant dies prior to the establishment of separate account(s) in the name of the Alternate Payee, such Alternate Payee shall be treated as the surviving spouse of the Participant for any death benefits payable under the Plan to the extent of the full amount *his/her* benefits as called for under Paragraph 7 of this Order. Should the Participant predecease the Alternate Payee after the new account(s) have been established on his/her behalf, such Participant's death shall in no way affect the Alternate Payee's right to the portion of *his/her* benefits set forth herein.
12. Savings Clause: This Order is not intended and shall be constructed in such a manner as to require the Plan:
 - a. to provide any type or form of benefit option not otherwise provided under the terms of the Plan;
 - b. to require the Plan to provide increased benefits determined on the basis of actuarial value; or

- c. to require the payment of any benefits to the Alternate Payee that are required to be paid to another payee under another order that was previously deemed to be a QDRO.
13. **Certification of Necessary Information:** All payments made pursuant to this Order shall be conditioned on the certification by the Alternate Payee and the Participant to the Plan Administrator of such information as the Plan Administrator may reasonably require from such parties to make the necessary calculation of the benefit amounts contained herein.
14. **Continued Qualified Status of Order:** It is the intention of the parties that this QDRO continue to qualify as a QDRO under Section 414(p) of the Internal Revenue Code, as it may be amended from time to time, and that the Plan Administrator shall reserve the right to reconfirm the qualified status of the Order at the time benefits become payable hereunder.
15. **Tax Treatment of Distributions Made Under This Order:** For purposes of Sections 402(a)(1) and 72 of the Internal Revenue Code, any Alternate Payee who is the spouse or former spouse of the Participant shall be treated as the distributee of any distribution or payments made to the Alternate Payee under the terms of this Order, and as such, will be required to pay the appropriate federal income taxes on such distribution.
16. **Constructive Receipt:** In the event that the Plan Trustee inadvertently pays to the Participant any benefits that are assigned to the Alternate Payee pursuant to the terms of this Order, the Participant shall immediately reimburse the Alternate Payee to the extent that *she/he* has received such benefit payments, and shall forthwith pay such amounts so received directly to the Alternate Payee within ten (10) days of receipt.
17. **Continued Jurisdiction:** The Court shall retain jurisdiction with respect to this Order to the extent required to maintain its qualified status and the original intent of the parties as set forth herein. The Court shall also retain jurisdiction to enter such further orders as are necessary to enforce the assignment of benefits to Alternate Payee as set forth herein, including the recharacterization thereof as a division of benefits under another plan, as applicable, or to make an award of spouse support, if applicable, in the event that Participant fails to comply with the provisions contained above requiring said payments to Alternate Payee.
18. **Plan Termination:** In the event of a Plan termination, the Alternate Payee shall be entitled to receive *his/her* portion of Participant's benefits as set forth herein in accordance with the Plan's termination provisions for participants and beneficiaries.

19. Actions by Participant: The Participant shall not take any actions, affirmative or otherwise, that can circumvent the terms and provisions of the Qualified Domestic Relations Order, or that could diminish or extinguish the rights and entitlements of the Alternate Payee as set forth herein. Should the Participant take any action or inaction to the detriment of the Alternate Payee, *she/he* shall be required to make sufficient payments directly to the Alternate Payee to the extent necessary to neutralize the effects *her/his* actions or inactions and to the extent of *his/her* full entitlements hereunder.

IT IS SO ORDERED.

Respectfully submitted,

JUDGE

APPROVED BY:

Attorney for Defendant

Attorney for Plaintiff

**MODEL QDRO FOR
DEFINED BENEFIT PENSION PLAN**

IN THE COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
_____ COUNTY, OHIO

_____)	CASE NO. _____
)	
Plaintiff)	JUDGE _____
)	
vs)	<u>QUALIFIED DOMESTIC RELATIONS ORDER</u>
)	
_____)	
)	
Defendant)	

1. Effect of This Order as a Qualified Domestic Relations Order: This Order creates and recognizes the existence of an Alternate Payee's right to receive a portion of the Participant's benefit payable under an employer sponsored defined benefit pension plan which is qualified under Section 401 of the Internal Revenue Code (the "Code") and the Employee Retirement Income Security Act of 1974 ("ERISA"). It is intended to constitute a Qualified Domestic Relations Order ("QDRO") under Section 414(p) of the Code and Section 206(d)(3) of ERISA.

2. Participant Information: The name, last known address, birth date, and Social Security Number of the Plan Participant is:
Name: _____
Address: _____
Birth Date: _____
Social Security No: _____

3. Alternate Payee Information: The name, last known address, birth date, and Social Security Number of the "Alternate Payee" is:
Name: _____
Address: _____
Birth Date: _____
Social Security No: _____

The Alternate Payee shall have the duty to notify the Plan Administrator in writing of any changes in *her/his* mailing address subsequent to the entry of this Order.

4. Plan Name: The name of the Plan to which this Order applies is the _____ (hereinafter referred to as "Plan"). Further, any successor plan to the Plan or any other Plan(s), to which liability for provision of the Participant's benefits described below is incurred, shall also be subject to the terms of this Order. Also, any benefits accrued by the Participant under a predecessor plan of the employer or any other defined benefit plan sponsored by the Participant's employer, where liability for benefits accrued under such predecessor plan or other defined benefit plan has been transferred to the Plan, shall also be subject to the terms of this Order.
5. Pursuant to State Domestic Relations Law: This Order is entered pursuant to the authority granted in the applicable domestic relations laws of the State of Ohio.
6. For Provision of Marital Property Rights: This Order relates to the provision of marital property rights and/or spousal support to the Alternate Payee as a result of the Order of Divorce between Participant and Alternate Payee.
7. Amount of Alternate Payee's Benefit: This Order assigns to Alternate Payee an amount equal to the actuarial equivalent of _____ Percent (____%) of the Marital Portion of the Participant's Accrued Benefit (including any temporary or supplemental benefits that may become payable) under the Plan as of the Participant's benefit commencement date, or the Alternate Payee's benefit commencement date, if earlier. The Marital Portion shall be determined by multiplying the Participant's Accrued Benefit by a coverture fraction (less than or equal to 1.0), the numerator of which is the number of months of the Participant's creditable service in the Plan earned during the marriage (from _____, _____ to _____, _____), and the denominator of which is the total number of months of the Participant's creditable service in the Plan as of the earlier of *his/her* date of cessation of benefit accruals or the date that Alternate Payee commences *her/his* benefits hereunder.

In addition to the above, the Alternate Payee shall receive a pro rata share of any post-retirement cost of living adjustments or other economic improvements made to the Participant's benefits on or after the date of *his/her* retirement. Such pro rata share shall be calculated in the same manner as the Alternate Payee's share of the Participant's retirement benefits is calculated pursuant this Section 7.

Notwithstanding the language set forth above in this Section 7 in the event that the Alternate Payee becomes entitled to a Qualified Preretirement Survivor Annuity under Section 9 of this Order, then the Alternate Payee's right to a share of the Participant's benefits as called for under this Section 7 shall be terminated as of the date of such Participant's death, and such preretirement death benefit shall be payable to the Alternate Payee in lieu of any other benefits to which *she/he* may be entitled under the terms of this Order.

8. Commencement Date and Form of Payment to Alternate Payee: The Alternate Payee may elect to commence *her/his* benefits under the plan at any time on or after the date the Participant attains the "earliest retirement age" as such term is defined in the Plan and Section 414(p) of the Internal Revenue Code. Further, in the event the Participant becomes eligible to commence benefits at an earlier date as a result of a disability retirement, then the Alternate Payee shall also be entitled to commence *her/his* share

of the benefits at such earlier date. Notwithstanding the above, the Alternate Payee shall commence *her/his* share of the benefits no later than the Participant's actual date of benefit commencement.

The Alternate Payee may elect to receive *her/his* benefits in any one of the allowable benefit distribution options permitted under the terms and provisions of the Plan, other than a Qualified Joint and Survivor Annuity with *her/his* current spouse as the beneficiary.

This QDRO utilizes a separate interest approach, whereby the Alternate Payee's assigned share of the benefits is to be actuarially adjusted to the life expectancy of such Alternate Payee. Any actuarial adjustment which may be necessary to convert Alternate Payee's benefits to *her/his* own lifetime should be applied to the Alternate Payee's benefits. As a result, should the Participant predecease the Alternate Payee after the Alternate Payee's benefit commencement date, *his/her* death shall not affect the Alternate Payee's right to continued benefits.

Further, should any early commencement reduction be necessary in the event that the Alternate Payee commences benefits prior to the Participant's Normal Retirement Date, then such reduction shall be applied to Alternate Payee's benefits in accordance with applicable Plan provisions.

Also, the Alternate Payee shall be entitled to a pro rata share of any early retirement subsidy (including any temporary or supplemental benefits) provide under the Plan to the Participant on the date of *his/her* retirement, and in the event the Alternate Payee has already commenced *her/his* share of the benefits on the date of the Participant's retirement, then the amounts payable to the Alternate Payee shall be "recalculated" in accordance with the Plan Administrator's practices and the Plan's actuarial principles in order to provide the Alternate Payee with *her/his* pro rata share of such early retirement subsidy. Such pro rata share shall be calculated in the same manner as the Alternate Payee's share of the Participant's retirement benefits is calculated pursuant to Section 7 of this Order.

Further, the Alternate Payee shall be entitled to a pro rata share of any early retirement supplements, interim supplements, or temporary benefits that become available to the Participant which are not considered by the Plan Administrator to be a part of the Participant's accrued benefit as set forth in Section 7. The Alternate Payee's share of such supplement, interim, or temporary benefits shall be proportional to the Alternate Payee's interest in the Participant's total accrued benefit pursuant to the formula set forth in Section 7 above.

9. Treatment of Alternate Payee as Surviving Spouse for Purpose of Determining Qualified Preretirement Survivor Annuity as such term is defined in Section 417 of the Code: In the event that the Participant predeceases the Alternate Payee, and neither the Participant nor the Alternate Payee has commenced benefits under the Plan, such Alternate Payee shall be designated as the surviving spouse of the Participant for purposes of establishing Alternate Payee's entitlement to receipt of the monthly preretirement survivor annuity. For purposes of determining the eligibility for such surviving spouse benefits, the Alternate Payee and the Participant have satisfied the one year marriage requirement as enumerated in Sections 401(a)(11) and 417(d) of the Code and as may be required under the provisions of the Plan.

This designation applies to the Marital Portion of the Participant's accrued benefit as set forth in Section 7. As result, the Alternate Payee shall be treated as the surviving spouse for purposes of any preretirement survivor annuity benefits that are attributable to the Martial Portion of the Participant's benefits as defined in Section 7 above and any subsequent spouse of the Participant shall not be treated as a surviving spouse for such purposes. However, an eligible subsequent spouse of the Participant, if any, may receive the remainder of any preretirement survivor annuity benefits which are attributable to the nonmarital portion of the Participant's accrued benefit.

In the event that the costs associated with providing this preretirement survivor annuity benefit are not fully subsidized by the Participant's employer then Participant must make an affirmative election for such preretirement survivor annuity benefit coverage in a timely manner and in accordance with *his/her* employer's election procedures. If the Participant terminates *his/her* employment before retirement, *he/she* shall still be required to maintain the preretirement survivor annuity coverage in place for the benefit of the Alternate Payee even if the Plan Administrator allows *him/her* the opportunity to opt out of such coverage. At all times, the Participant shall take whatever steps are necessary in order to maintain the preretirement survivorship coverage in place.

10. Death of Participant After Alternate Payee's Benefit Commencement Date: Pursuant to the terms of Section 8 of this Order, the Alternate Payee's benefits are to be actuarially adjusted to *her/his* own life expectancy. Under this Separate Interest Approach, once the Alternate Payee commences *her/his* assigned share of the benefits in accordance with the terms of this Order, the Alternate Payee's right to continued benefits shall be unaffected by the subsequent death of the Participant.
11. Death of Alternate Payee: If the Alternate Payee predeceases Participant prior to the commencement of *his/her* benefits, the Alternate Payee's portion of Participant's befits, as stipulated herein, shall become payable to the Alternate Payee's designated beneficiary (or estate), but only to the extent permitted under the terms of the Plan. If the Plan Administrator does not permit the Alternate Payee to designate a beneficiary (or estate) for such purposes, then *her/his* assigned share of the benefits shall revert to the Participant, but again, only to the extent permitted under the Plan. Should the Alternate Payee predecease the Participant after *his/her* benefit commencement date, then such remaining benefits, if any, will be paid in accordance with the form of benefit elected by such Alternate Payee.
12. Savings Clause: This Order is not intended and shall be constructed in such a manner as to require the Plan:
 - a. to provide any type or form of benefit option not otherwise provided under the terms of the Plan;
 - b. to require the Plan to provide increased benefits determined on the basis of actuarial value; or
 - c. to require the payment of any benefits to the Alternate Payee that are required to be paid to another payee under another order that was previously deemed to be a QDRO.

13. **Certification of necessary information:** All payments made pursuant to this Order shall be conditioned on the certification by the Alternate Payee and the Participant to the Plan Administrator of such information as the Plan Administrator may reasonably require from such parties to make the necessary calculation of the benefit amounts contained herein.
14. **Continued Qualified Status of Order:** It is the intention of the parties that this QDRO continue to qualify as a QDRO under Section 414(p) of the Internal Revenue Code, as it may be amended from time to time, and that the Plan Administrator shall reserve the right to reconfirm the qualified status of the Order at the time benefits become payable hereunder.
15. **Tax Treatment of Distributions Made Under This Order:** For purposes of Sections 402(a)(1) and 72 of the Internal Revenue Code, any Alternate Payee who is the spouse or former spouse of the Participant shall be treated as the distributee of any distribution or payments made to the Alternate Payee under the terms of this Order, and as such, will be required to pay the appropriate federal income taxes on such distribution.
16. **Constructive Receipt:** In the event that the Plan Trustee inadvertently pays to the Participant any benefits that are assigned to the Alternate Payee pursuant to the terms of this Order, the Participant shall immediately reimburse the Alternate Payee to the extent that such has received such benefit payments, and shall forthwith pay such amounts so received directly to the Alternate Payee within ten (10) days of receipt.
17. **Continued Jurisdiction:** The Court shall retain jurisdiction with respect to this Order to the extent required to maintain its qualified and the original intent of the parties as set forth herein. The Court shall also retain jurisdiction to enter such further orders as are necessary to enforce the assignment of benefits to Alternate Payee as set forth herein, including the recharacterization thereof as a division of benefits under another plan, as applicable, or to make an award of spouse support, if applicable, in the event that Participant fails to comply with the provisions contained above requiring said payments to Alternate Payee.
18. **Effect of Plan Termination:** In the event that the Plan is terminated, whether on a voluntary or involuntary basis, and the Participant's benefits become guaranteed by the Pension Benefit Guaranty Corporation ("PBGC"), the Alternate Payee's benefits, as stipulated herein, shall also be guaranteed to the same extent in accordance with the Plan's termination rules and in the same ratio as the Participant's benefits are guaranteed by the PBGC.
19. **IRC Section 415 Limitations:** In the event that the Participant's accrued benefit is limited and/or reduced as a result of a benefit limitation imposed under Section 415 of the Internal Revenue Code, as amended from time to time, then the Alternate Payee's share of the benefits shall also be limited and/or reduced in the same proportion and to the same extent as the Participant's benefits.
20. **Overpayments:** In the event that the Plan Administrator determines that an overpayment has been made to the Participant and/or the Alternate Payee for any reason, including but not limited to, the Participant's retroactive eligibility for Social

Security disability payments, and the parties cannot come to an agreement regarding their respective liability toward the Plan recoupment of such overpayments, the Court shall reserve jurisdiction regarding the allocation of such repayments to the Plan between the Participant and the Alternate Payee.

21. Actions by Participant: This Participant shall not make any actions, affirmative or otherwise, that can circumvent the terms and provisions of the Qualified Domestic Relations Order, or that could diminish or extinguish the rights and entitlements of the Alternate Payee as set forth herein. Should the Participant take any action or inaction to the detriment of the Alternate Payee, *he/she* shall be required to make sufficient payments directly to the Alternate Payee to the extent necessary to neutralize the effects of *his/her* actions or inactions and to the extent of *her/his* full entitlements hereunder.
22. Notice of Pending Retirement: Pursuant to the terms of Section 8 above, the Alternate Payee shall be required to commence *her/his* share of the benefits no later than the Participant's actual date of benefit commencement. Therefore, the Participant shall be required to notify the Alternate Payee, in writing thirty (30) days prior to *her/his* actual date of retirement. Such notice shall indicate *his/her* intention to retire and *his/her* elected benefit commencement date. The notice shall be sent via regular, first class mail. For this purpose, the Alternate Payee shall notify the Participant of any changes in *her/his* mailing address.

IT IS SO ORDERED.

JUDGE

APPROVED BY:

Attorney for Defendant

Attorney for Plaintiff