THE ENFORCER

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Several weeks ago I received a call from an attorney with an interesting question. She asked whether opposing counsel could collect attorney fees from her client by the entry of a Qualified Domestic Relations Order ("QDRO"). Her client ("Debtor"), has an employer provided pension benefit plan, governed by the Employee Retirement Income Security Act ("ERISA").

Opposing counsel (the "Creditor"), was seeking payment of attorney fees ordered paid to him in the parties' Judgment of Divorce. Further, subsequent to the entry of the divorce judgment, Creditor had also obtained a money judgment quantifying the unpaid attorney fees[1]. Debtor did not want to liquidate retirement funds to pay Creditor attorney. What to do? There is significant law on point.

Erisa and Federal Pre-Emption

ERISA, found at 29 U.S.C. Chapter 18, and in various sections of the Internal Revenue Code, was enacted by Congress in 1974. Its purpose was to regulate the administration of employer provided employee pension benefit plans and employee welfare benefit plans. Encompassed in this group of regulated plans are those with which you are familiar: your 401(k)'s, defined benefit and defined contribution plans, and health benefit plans.

Both State law and ERISA bar the attachment of retirement funds for the satisfaction of claims of general creditors (See M.C.L. § 600.6023 and 29 U.S.C. § 1056(d)(1)). An analysis of the statutory scheme shows that Congress intended to create a distinction between voluntary transfers such as an assignment or alienation, which the statute prohibits, and court-ordered transfers of funds for the purpose of support, a matter upon which the statute is silent. (See *In re M. H. v J. H.*, 93 Misc 2d 1016, 1020-21, 403 NYS 2d 411, 414-15 (Fam.Ct. 1978)), 29 U.S.C. § 1144(b)(7).

29 U.S.C. § 1056(d)(1), the anti-alienation provision of ERISA, states that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." Further, Federal pre-emption is established by 29 U.S.C. § 1144(a) which provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan…" The U.S. Supreme Court clarified the limits of ERISA's pre-emption when it held that the "pre-emption clause should apply only to those state laws that purport to regulate subjects regulated by ERISA or that are inconsistent with ERISA's central purposes." *FMC Corp. v Holliday*, 498 US 52, 111 S Ct 403 (1990).

Michigan Exemptions for Retirement Accounts

Michigan's exemption statute, M.C.L. § 600.6023, delineates the property which is exempt from levy or attachment by a creditor, including retirement accounts. However, § 600.6023 provides several exceptions:

1. The following property of the debtor and the debtor's dependents shall be exempt from levy and sale under any execution:

k. An individual retirement account or individual retirement annuity as defined in section 408 or 408a of the internal revenue code of 1986 and the payments or distributions from such an account or annuity. This exemption applies to the operation of the federal bankruptcy code as permitted by section 522(b)(2) of title 11 of the United States Code, 11 U.S.C. 522. This exemption does not apply to any amounts contributed to an individual retirement account or individual retirement annuity if the contribution occurs within 120 days before the debtor files for bankruptcy. This exemption does not apply to an individual retirement account or individual retirement annuity to the extent that any of the following occur:

i. The individual retirement account or individual retirement annuity is subject to an order of a court

pursuant to a judgment of divorce or separate maintenance.

ii. The individual retirement account or individual retirement annuity is subject to an order of a court concerning child support.

iii. Contributions to the individual retirement account or premiums on the individual retirement annuity, including the earnings or benefits from those contributions or premiums, exceed, in the tax year made or paid, the deductible amount allowed under section 408 of the internal revenue code of 1986. This limitation on contributions does not apply to a rollover of a pension, profitsharing, stock bonus plan or other plan that is qualified under section 401 of the internal revenue code of 1986, or an annuity contract under section 403(b) of the internal revenue code of 1986.

l. The right or interest of a person in a pension, profitsharing, stock bonus, or other plan that is qualified under section 401 of the internal revenue code of 1986, or an annuity contract under section 403(b) of the internal revenue code of 1986, which plan or annuity is subject to the employee retirement income security act of 1974, Public Law 93406, 88 Stat. 829. This exemption applies to the operation of the federal bankruptcy code, as permitted by section 522(b)(2) of title 11 of the United States Code, 11 U.S.C. 522. This exemption does not apply to any amount contributed to a pension, profitsharing, stock bonus, or other qualified plan or a 403(b) annuity if the contribution occurs within 120 days before the debtor files for bankruptcy. This exemption does not apply to the right or interest of a person in a pension, profitsharing, stock bonus, or other qualified plan or a 403(b) annuity to the extent that the right or interest in the plan or annuity is subject to any of the following:

i. An order of a court pursuant to a judgment of divorce or separate maintenance.

ii. An order of a court concerning child support.

2. The exemptions provided in this section shall not extend to any lien thereon excluded from exemption by law.

Both State and Federal law are clear that benefits provided under an ERISA plan are not assignable or alienable except pursuant to a QDRO. See 29 U.S.C. § 1056(d)(1) and 29 U.S.C. § 1056(d)(3)(A). We also know that a domestic relations order ("DRO") may be entered for the division of marital property or support obligations[2]. However, more analysis is required to determine if an attorney fee award can be structured to fit into one of the State law exceptions, i.e. marital property division or a support obligation. Ultimately, the intent of both ERISA and Michigan law is to protect retirement accounts from claims of creditors. Nonetheless, the case law is clear that these protections are not intended to insulate a plan participant from the claims of his dependents.

Analysis and Consideration of MCR 3.206

Michigan Court Rule 3.206(C) addresses when attorney fees may be awarded in a domestic relations action. It provides:

Rule 3.206 Pleading

C Attorney Fees and Expenses.

1. A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a postjudgment proceeding.

2. A party who requests attorney fees and expenses must allege facts sufficient to show that

a. the party is unable to bear the expense of the action, and that the other party is able to pay, or

b. the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

One can see from the court rule that the reason for the attorney fee award will likely determine the character of the fees.

Now back to the original question: Can an attorney obtain payment of his court ordered fees through the entry of a QDRO to liquidate retirement funds? If the other party is unable to bear the expense of their own attorney's fees, it could be argued that the award falls in the category of support, or if embodied in the JOD, the marital property division. Indeed, there is a line of cases that provide that attorney fees incurred in the enforcement of a support obligation are also in the nature of support. However, there is a catch, and several caveats. First, QDRO's have limited alternate payees; an alternate payee cannot be anyone other than a spouse, former spouse, child, or other dependent of a participant. There is no special provision for attorneys who need to get paid.

If a QDRO is eventually entered for the end purpose of paying attorney fees because those fees meet the appropriate criteria, it is likely that the ex-spouse would be the alternate payee, who would then have to voluntarily pay over those funds to the Creditor attorney. It may just work if everybody consents. Alternatively, I have been successful in having the alternate payee's check remitted in care of the attorney's law office (you would need a separate order authorizing the negotiation of the check). Also, please give additional consideration to the body of law that provides that spousal support is not assignable. (See *Wells v Brown*, 226 Mich 657, 198 NW 180 (1924), and *Fournier v Clutton*, 146 Mich 298, 109 NW 425 (1906)). If that consent is removed after the expense of preparation of a QDRO and a Motion, it could turn out that the debt burden may simply be shifted, with no satisfaction of attorney fees.

Ultimately, the intent of both ERISA and Michigan law is to protect retirement accounts from claims of creditors. Nonetheless, the case law is clear that these protections are not intended to insulate a plan participant from the claims of his dependents (or if appropriate, their attorney).

Endnotes

1. The debt was owed directly from Debtor to Creditor attorney, not pursuant to an award to Debtor's ex-spouse under MCR 3.206.

2. Upon receipt of an order, the plan administrator must promptly notify the plan participant and the proposed alternate payee of the receipt of the order and the plan's procedures for determining whether the order is a QDRO. '1056(d)(3)(G)(i)(I).