



Chapter 5

# Spousal Rights, QDROs, and Tax Qualified Retirement Plans

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**Ohio State  
Bar Association**

November 9, 2016

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Updated: 09/20/2016

## II. Definition of "Spouse" and "Marriage":

- ***Obergefell v. Hodges***, 135 S.Ct. 2071 (2015).
- ***U.S. v. Windsor***, 133 S.Ct. 2675 (2013).
- IRS Rev. Rul. 2013-17.
- DOL Technical Release 2013-04.
- IRS Notice 2015-86. Issues raised under ***Obergefell*** are sufficiently covered in Rev. Rul. 2013-17.

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➤ ***Obergefell v. Hodges*, 135 S. Ct. 2071 (2015).**

The 14<sup>th</sup> Amendment to the U.S. Constitution requires every state to:

- License a marriage between two people of the same sex; and
- Recognize a marriage between two people of the same sex if their marriage was lawfully performed in another state.



***Obergefell***

"The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold — and it now does hold — that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character."



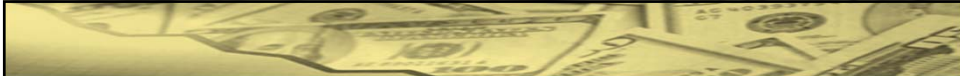
➤ **U.S. v. Windsor**

- In **United States v. Windsor**, 133 S.Ct 2675 (2013), the U.S. Supreme Court struck down as unconstitutional Section 3 of the Defense of Marriage Act ("DOMA") which provided that only opposite-sex marriages would be recognized as valid for federal law purposes.
  - ❖ As a result of Windsor, individuals who are spouses in a same-sex marriage that is recognized under applicable state law are considered to be married when applying federal laws and regulations that refer to marital status.

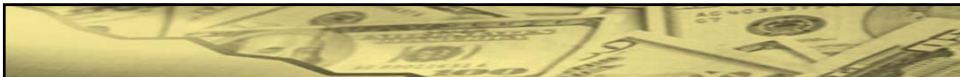


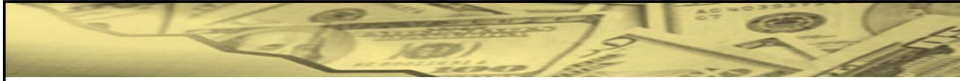
➤ **Revenue Ruling 2013-17**

- The IRS addressed the impact of the Supreme Court ruling in Windsor in Revenue Ruling 2013-17 and Frequently Asked Questions (FAQs). Rev. Rul. 2013-17 has three primary holdings:
  - ❖ **"Marriage" and "Spouse" Include Same Sex Marriages.** For federal tax purposes, the term "spouse" (and husband/wife) includes an individual married to a person of the same sex if the individuals are lawfully married under state law. The term "marriage" includes a same sex marriage.

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- ❖ **"Place of Celebration" Controls.** The IRS adopts a general rule recognizing a marriage of same-sex individuals that was validly entered into in a state (or country) whose laws authorize the marriage of two individuals of the same sex even if the married couple is domiciled in a state that does not recognize the validity of same sex marriages.

*Obergefell* requires states to both license and recognize same-sex marriages.

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- ❖ **Domestic Partnerships Not Recognized.** The terms "spouse", "husband", "wife", or "marriage" do not include individuals (whether of the opposite sex or the same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state.

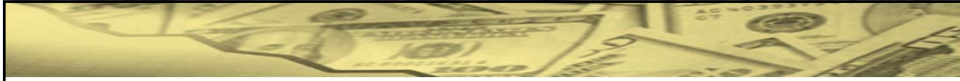
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- The rulings in Rev. Rul. 2013-17 were based on a long-standing IRS position (first stated in Rev. Rul. 58-66) which recognizes a valid common law marriage even if the taxpayer relocates to a state that does not recognize common law marriages.
  - Rev. Rul. 2013-17 is effective prospectively as of September 16, 2013. However, affected taxpayers may rely on the ruling for the purpose of filing original returns, amended returns, adjusted returns, or claims for credit or refund of any overpayment of tax.



➤ **DOL Technical Release 2013-14.**


The DOL guidance very closely tracks the position of the IRS in Rev. Rul. 2013-17.

- The term "**spouse**" will be read to refer to any individuals who are lawfully married under any state law, including individuals married to a person of the same sex who were legally married in a state (or country) that recognizes such marriage, but who are domiciled in a state that does not recognize such marriages.

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- The term "**marriage**" will be read to include a same sex marriage that is legally recognized as a marriage under any state law.
  - The terms "**spouse**" and "**marriage**" do not include individuals in a formal relationship recognized by a state that is not denominated a marriage under state law, such as a domestic partnership or civil unions. This applies to both opposite sex and same sex relationships.

**"Marriage" means marriage.**

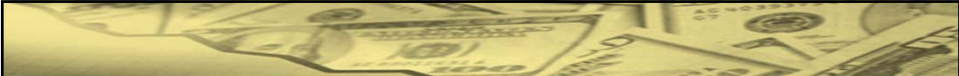
**"Spouse" means spouse.**



➤ **Impact of Rev. Rul. 2013-17 and DOL Tech. Release 2013-04 on tax-qualified retirement plans.**

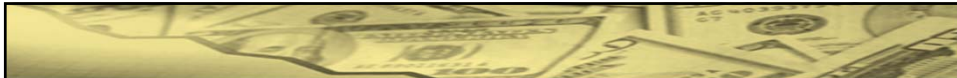
Spouses of marriages between individuals of the same sex will be treated the same as spouses in opposite sex marriages for purposes of:

- Providing a qualified joint and survivor annuity (QJSA) and a qualified pre-retirement survivor annuity (QPSA) in plans subject to the QJSA rules.
- Requiring the consent of a participant's spouse to the participant's election of an optional form of benefit in plans subject to the spousal consent requirements.

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- Requiring the consent of a participant's spouse to a participant's designation of a non-spouse beneficiary.
  - Requiring the consent of a participant's spouse to a plan loan if the plan requires spousal consent.
  - Safe harbor hardship distribution rules.
  - Qualified Domestic Relations Orders (QDROs).
  - Required Minimum Distribution Rules.
  - Permitting the spouse to elect a direct rollover to a retirement plan or IRA (not just an "inherited IRA").




## **SPOUSAL RIGHTS TO RETIREMENT BENEFITS AND ANNUITY REQUIREMENTS**



- The intent of the Retirement Equity Act of 1984 (REA) was to protect spousal rights to a portion of the benefit in the event of divorce or death.

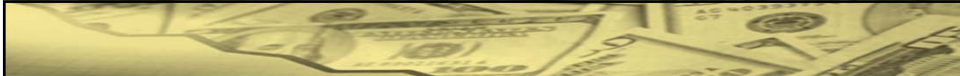
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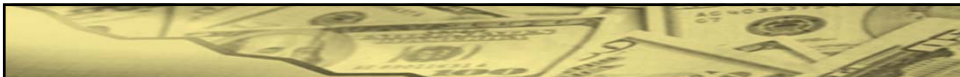


- REA recognizes the spouse's right to at least fifty percent of the benefit by requiring that a plan (excluding a profit-sharing or 401(k) plan that does not contain contributions from a pension plan, does not provide any benefits in the form of an annuity, and provides for a 100% death benefit payable 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.

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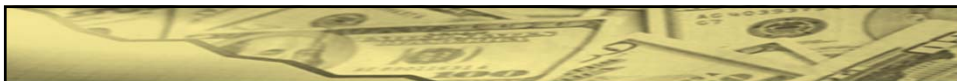


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- Pension Protection Act of 2006 (PPA) Additional Annuity Options.
    - Plans must offer both: (i) a 50% QJSA and a (ii) 75% or greater QJSA.

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- 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.



- The IRS has ruled that state "slayer laws" override the requirements for spousal death benefits under I.R.C. §§401(a)(11) and 417. If a participant is killed by his or her spouse and state law prohibits a killer from inheriting benefits from the person killed, such law also applies to pension benefits. PLR 8908063.



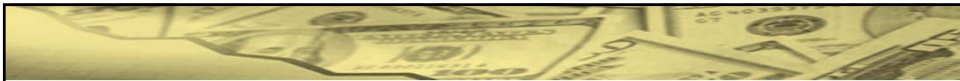
### **Qualified Joint and Survivor Annuity (QJSA).**

- 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.



## Qualified Pre-Retirement Survivor Annuity (QPSA) I.R.C. §417(c).

- Unless the participant and spouse elect otherwise, REA requires that a death benefit be paid to the spouse in the form of a QPSA.
- The amount of the QPSA equals:
  - Fifty percent of the benefit that the participant would have received under a Qualified Joint and Survivor Annuity (QJSA) (*i.e.*, the survivor portion);

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- Thus, in the case of a **defined contribution plan**, the QPSA is an annuity which is equal to one-half of the participant's vested account balance. 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.



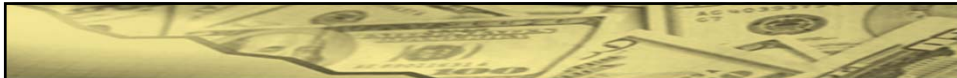
## **QJSA, QPSA, and Distribution Issues.**

- 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).




## **Unmarried Participant in Defined Benefit Plan.**

- A defined benefit plan is not required to provide for a death benefit to anyone other than a surviving spouse.
- An unmarried participant who dies prior to the commencement of benefit payments may be treated as if the participant elected a single life (life only) annuity and died prior to first payment. In this case, the accrued benefit of the unmarried participant may be forfeited.
- Alternatively, a defined benefit plan may provide for a death benefit equal to the present value of the participant's vested accrued benefit.




- QJSA and QPSA requirements apply to all pension (defined benefit or defined contribution) plans and to profit-sharing plans or 401(k) 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).

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- If a profit-sharing plan or 401(k) plan provides for a spousal 100% 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.

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- If a participant's vested accrued benefit does not exceed \$5,000, 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).



### **Spousal Rights Summary.**

- **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.
- **Profit-sharing plan or 401(k) plan (without annuity benefit).**  
Spouse has no right to benefits paid to participant prior to death but is entitled to 100% of benefits at participant's death.



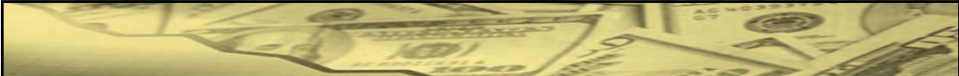
## Prenuptial Agreements.

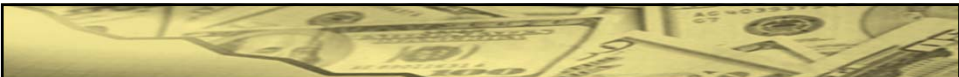
- An agreement entered into prior to marriage does not satisfy the spousal consent requirement. Treas. Reg. §1.401(a)-20, Q&A 28.
- The U.S. 6<sup>th</sup> Circuit Court of Appeals ruled that a prenuptial agreement by itself cannot satisfy ERISA spousal-consent requirements for spousal waiver of ERISA retirement plan death benefits. *Greenbaum, Doll and McDonald, PLLC v. Sandler*, 6<sup>th</sup> Cir., No. 06-6494, unpublished (12/3/07).




## Spousal Beneficiaries and Divorce.


- 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.
  - The divorce decree provided that the spouse was waiving her rights to the retirement plan but it was not qualified as a QDRO.

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- 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 and other rights to receive death benefits arising under a contract. Ohio Rev. Code §1339.63.

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- 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).



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- A plan provision providing that a former spouse is not a beneficiary under a pre-divorce beneficiary form designating the spouse as a beneficiary is reaffirmed following the divorce is valid.




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



## 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 clarify certain issues relating to the timing and order of a QDRO.
  - QDROs can be issued after or to revise a prior QDRO.
  - Multiple QDROs for multiple prior spouses are permitted.

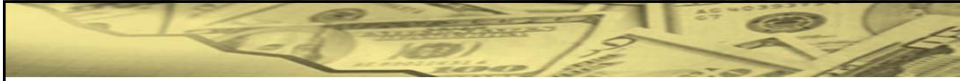
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- QDROs may be issued or revised after the death of the participant.
  - QDRO can require that former spouse be treated as surviving spouse.
  - QDRO can be issued after annuity starting date.

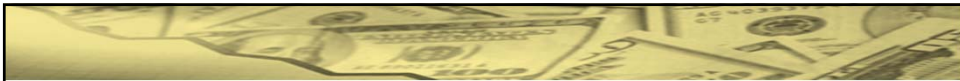


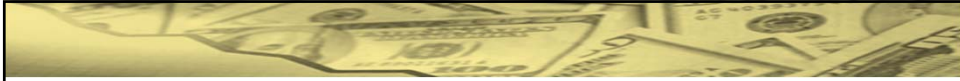
## ERISA Preempts State Domestic Relations Laws.

- 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").

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- 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).


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- In order for a domestic relations order to be qualified, it must:
    - ❖ 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;
    - ❖ Clearly specify the names and last known addresses of the alternate payees and the participant;


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- ❖ 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
  - ❖ 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).




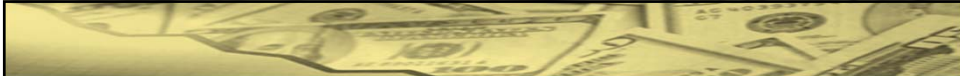
- Alternate payee defined.

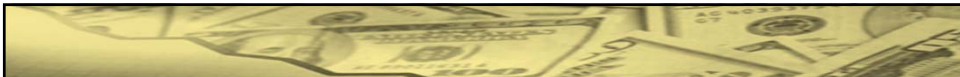
- ❖ A QDRO can only grant benefits in favor of an alternate payee. The term "alternate payee" means any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant. I.R.C. §414(p)(8).

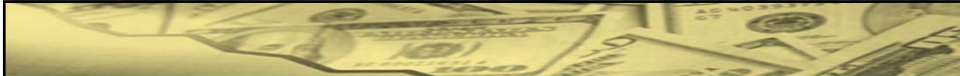
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- ❖ In DOL Advisory Opinion 2002-03A, the Department of Labor (DOL) ruled that a governmental agency (e.g., CSEA) may receive a QDRO payment on behalf of an alternate payee. The DOL stated that although the Mississippi Division of Child Support Enforcement could not be considered to be an alternate payee, payments could be made to the agency on behalf of an alternate payee.

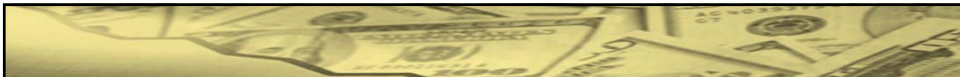
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- A domestic relations order is not qualified if it conflicts with the terms of the plan. I.R.C. §414(p)(3).
    - ❖ If the plan provides for a specific type or form of benefit, the order cannot require the plan to provide for a different benefit.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

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- ❖ The order cannot supersede the rights of another alternate payee pursuant to a previous QDRO.
  - ❖ Unless the plan provides for early retirement benefits, the QDRO cannot require it to do so.

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- ❖ 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.

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- A QDRO can require payment of early retirement benefits under a plan which provides such benefits.
    - 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:

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- ❖ the date on which the participant is entitled to a distribution under the plan, or
  - ❖ the later of:
    - the date the participant attains age 50, or
    - the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

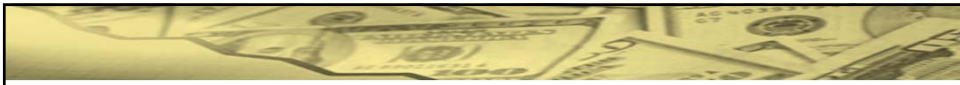
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- A plan may provide that benefits can be paid to an alternate payee under a QDRO although a participant is not in pay status.
  - A QDRO may conflict with a subsequent spouse's rights to a portion of a participant's retirement benefit under REA. I.R.C. §414(p)(5).
    - A QDRO can require the former spouse to be treated as the survivor for purposes of the participant's survivorship benefits.







## Procedures for Dealing with a QDRO.

- Plan administrator's duties upon receipt of QDRO. I.R.C. §414(p)(6).
  - REA requires each plan to establish reasonable procedures to determine whether a Domestic Relations Order (DRO) is qualified, and to implement the QDRO.
  - 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.

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- If the plan administrator determines that the Domestic Relations Order is not qualified, he should notify the parties accordingly.
  - **18 Month Segregation Period.**

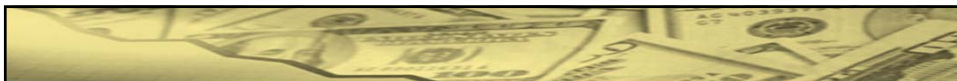
If there is a dispute regarding the validity of a domestic relations order, the plan administrator should not pay the disputed benefits to either of the parties until the dispute is resolved or for 18 months, whichever occurs first. The segregated assets are those that would be paid to the alternate payee.

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- Plan Administrator should notify Participants and Alternate Payee in writing of determination as to whether DRO is or is not qualified.

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- A retirement 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. *Schoonmaker v. Employee Savs. Plan of Amoco Corp. and Participating Co.*, 987 F.2d 410 (7<sup>th</sup> Cir. 1993).



- Transfer of retirement plan assets to a former spouse without a QDRO violates anti-alienation rules and disqualifies Plan.
- The Tax Court upheld the disqualification of an ESOP that permitted the transfer of a plan participant's benefits to her former spouse where the ESOP was not mentioned in the divorce decree or a QDRO.



- The transfer of plan assets without a QDRO violates the IRC §401(a)(13) anti-alienation rules and was an impermissible transfer of plan assets.
- ***Family Chiropractic Sports Injury & Rehab Clinic, Inc. v. CIR***, TC Memo 2016-10.



## Participant Loans and QDROs.

- QDRO should specify treatment of loans.
- Difficult for Alternate Payee to make loan payments.
- Plan provisions may require that loan payments be made from salary withholding from Plan Participant.



## Determining What Was "Earned During the Marriage" — The Coverture Fraction.

$$50\% \times \frac{\text{Credited Service While Married}}{\text{Credited Service at Retirement}} \times \text{Retirement Pension}$$



## Tax Effect of a QDRO Distribution.

- General rules pertaining to distribution from a qualified plan or an annuity are applicable. I.R.C. §§402(a)(1); 72.
- 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).



## ➤ Spouse Alternate Payee.

- 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).
- 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).



➤ **Nonspouse Alternate Payee.**

- 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).
- 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.