780 East Smith Road, Medina OH 44256 P: 844.721.6500 F: 330.722.6158 www.qdrogroup.com

Four Recently Contested Cases on Pensions and QDROs

When pension and QDRO experts argue in court, the court decision can be especially instructive. That is certainly true in the following four contested cases where employing hypothetical Social Security offsets, freezing all benefits at the time of the divorce, calculating pension present values using corporate bond rates and punishing women for their greater longevity were rejected. The Franklin County court, for example, was clear on Social Security offsets explaining: "The hypothetical offset method is simply unfair in this case, and many cases."[1] So also was a Delaware County court which saw freezing benefits at the time of the divorce as "not equitable."[2] Two of the courts, including one court of appeals, determined that the market-based PBGC present value method was superior to the corporate bond method.[3] Perhaps the most intriguing was a Magistrate's observation that valuing survivorship when attempting to draft a QDRO presented a clear ERISA violation.[4]

1) Giuliano v. Giuliano, C.A. DR12 343002 (C.P. Cuyahoga County Dec. 31, 2013).

Magistrate Anjanette A. Whitman faced a slew of novel issues in this case of dueling QDRO experts. David Kelley of QDRO Consultants Co. was retained by counsel of the plaintiff wife and the opposing expert for the defendant husband was a local actuary. Those issues centered on valuing survivorship, Title VII gender discrimination, the legal precedent established by *Hoyt v. Hoyt*, 53 Ohio St. 3d 177 (1990), ERISA rights to survivorship and whether present value calculations were necessary for *every* shared payment QDRO where survivorship was elected for the non-participant.

The basic contention of the plan participant husband was that because he was disabled and his wife healthy, that her 50% Joint & Survivor annuity had a robust actuarial present lump sum value that should be used to reduce the amount of her marital share of the pension below 50%. In other words, the husband/plan participant argued that he should receive more than 50% of the marital pension while alive and that the wife would actuarially make up for her lower stream of income by receiving her survivorship income for a much longer period because of the participant's early demise.

The logic was that women live longer than men, that disabled people have shorter lives and that granting 50% of the marital pension in a QDRO along with a 50% J&S annuity gives, in this particular case, the non-participant wife too much money. Perhaps the most revealing questions

[1] *Beierle v. Joliot*, C. 11DR-1440 (C.P. Franklin County) Oct. 10, 2013 at 18.
[2] *Colan v. Colan*, C. A. 06 DR A 06 0278 (C.P. Delaware County July 31, 2014) at #24.
[3] *Beierle v. Joliot*, C. 11DR-1440 (C.P. Franklin County) Oct. 10, 2013 and *Forman v. Forman,* C.A. 12 DR 0159 (C.P. Marion County Oct. 28 2013) appealed *Forman v. Forman*, C.A. 9-13-67 3d (Ohio Ct. App Aug. 18, 2014).
[4] *Giuliano v. Giuliano*, C.A. DR12 343002 (C.P. Cuyahoga County Dec. 31, 2013).

asked of the experts were the following posed by wife's attorney, Deanna DiPetta. The answers, when finally extracted, indicated that the participant's expert was advocating, in essence, penalizing women for living longer.

> Q. I would like you to assume the following facts: That a plan participant retires and gets divorced on the same day. That he was married to the same woman for the entire time that he was employed. That his wife is the same age that he is and that he elected a 50 percent joint and survivorship annuity, okay? If all of that is true, in your theory, the wife would not receive 50 percent of the pension while the participant is alive, right? Yes or no?
> A. The same age?
> Q. I said that.
> A. Same sex?
> Q. Excuse me?
> A. Well, I'm telling you there is a difference in mortality.
> THE MAGISTRATE: …Answer to the best of your ability if you are able to.
> Q. I will tell you the facts again.
> A. You are saying they should get the same benefit?
> Q. I will tell you the facts again.
> A. Okay.
> Q. Okay. If a plan participant retires and gets divorced on the same day, and was married to the same woman the entire time that he was employed and his wife was the same age as the participant and he elected a 50 percent joint and survivorship annuity, in your scenario, by your theories, the wife would not get the 50 percent benefit or 50 percent of his benefits during his life, right? Yes or no?
> A. That she would not get --
> Q. In your theory, she would not get 50 percent of the benefits that he receives in his life, correct?
> THE MAGISTRATE: Do you agree or disagree?
> A. That's correct.

Decision: The court did not mince words: "Mr. Kelley presented credible, sound and clear testimony to explain his determinations which were supported by application practices commonly used within the pension evaluation industry and current case law."[5] It focused especially on *Norris v. Arizona Governing Committee, Etc.* 671 F.2d 330 (1982)[6] and explained that because of the heightened scrutiny given to the protected class that "…there is no need to demonstrate the affirmative intent to discriminate based upon gender."[7] However, the *Giuliano*

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[5] *Giuliano* at 4.
[6] The United States Supreme Court agreed the following year in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983) that a woman of the same age, service and salary as a man must receive the same monthly benefit. Title VII of the Civil Rights Act of 1964 prohibits discriminating against a woman because she will longer on average.
[7] *Giuliano* at 4.

court felt that the defendant's failure to present evidence of his disability meant they could rule "Without even having the need to apply *Norris v. Arizona* to the case at hand…"[8]

Regarding the Defendant's expert, the court concluded: "This basis of this testimony is in direct conflict with *Hoyt v. Hoyt*.[9] Later the court noted that the Defendant's case was predicated on two fallacious arguments. The first was that it was the participant spouse "who directly 'earned' the pension"[10] and "that the pending divorce somehow has changed the applicable federal rules of how a non-participant spouse can be eliminated from receiving his or her portion of the benefit."[11] Here the court was referencing IRC 401(a)(11) established by the Retirement Equity Act of 1984 (which amended the Employee Retirement Income Security Act of 1974 -- ERISA) which mandates that a plan participant upon retiring must elect a 50% Joint and Survivor annuity or obtain a signed waiver from the non-participant spouse.

The court saw valuing survivorship as an attack upon a well established ERISA right:

> "ERISA dictates that the non-participant spouse is entitled to a 50% joint and survivorship annuity or may waive the same. However, the power to waive the 50% to which the non-participant spouse is entitled only lies with the non-participant spouse. The participant spouse or any other entity, such as a court, cannot decide this for the non-participant spouse. To have the participant spouse or another entity decide how the non-participant spouse should elect his or her benefit would be like forcing a non-participant spouse to waive his or her ability to opt in our out of the plan."[12]

2) Beierle v. Joliot, C. 11DR-1440 (C.P. Franklin County) Oct. 10, 2013.

The fairness of "Cornbleth"[13] hypothetical Social Security offsets when one of the parties has very low or no Social Security benefit was the issue faced by Columbus Judge Dana S. Preisse. Another major issue was whether a bond market valuation approach was superior to the PBGC present value approach. The *Cornbleth* method, as the court explained "requires that before a public pension is divided as marital property, an amount equivalent to a Social Security benefit the public participant would have earned had she contributed to Social Security is deducted from the present value of her public pension. This hypothetical value is then subtracted from the total value of the pension account and the remaining value of the pension account is what is divided among the parties."[14]

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[8] *Giuliano* at 5.
[9] *Hoyt v. Hoyt*, 53 Ohio St. 3d 177, 559 N.E.2d 1292 (1990).
[10] *Giuliano* at 6.
[11] *Giuliano* at 6.
[12] *Giuliano* at 4.
[13] *Cornbleth v. Cornbleth*, 397 Pa.Super. 421, 580 A.2d 369 (1990) appeal denied, 526 Pa. 648, 585 A.2ed 468 (1991).
[14] *Beierle v. Joliot*, C. 11DR-1440 (C.P. Franklin County) Oct. 10, 2013 at 15-16.

The opposing expert "testified that a hypothetical Social Security offset method (offset against Anne's pension) is the fairest method" and also "used a bond market valuation approach to determine Anne's hypothetical Social Security benefit."[15]

David Kelley of QDRO Consultants Company, LLC "advocated for a straight offset of the value of Anne's OPERS account against the marital portion of the present value of Daniel's social security benefits, rather than hypothetical Social Security Benefit offset" and "utilized the Pension Benefit Guaranty Corporation (PBGC) method, which values a retirement benefit by determining a market-based annuity replacement cost for the stream of income that would be provided by said pension."[16]

> **Decision:** "The hypothetical offset method is simply unfair in this case, and many cases"[17] concluded the court. The court explained how the *Cornbleth* holding had continued to "evolve in the Pennsylvania court system."[18] It specifically referenced the 1997 Pennsylvania case of *McClain v. McClain*[19] which held that "it would be inequitable under the facts of this case to credit Husband with the value of hypothetical social security contributions when Wife, unlike the [wife in *Cornbleth*, had] no appreciable social security benefits of her own to balance against such a credit.'[20]

3) Forman v. Forman, C.A. 12 DR 0159 (C.P. Marion County Oct. 28 2013).

Whether the PBGC method or a corporate bond method should be used to determine pension present values was the focus of the Forman case heard by Judge Deborah A. Alspach in Marion County. The Judge heard extensive testimony from David Kelley of QDRO Consultants Company, LLC on the efficacy of the PBGC method and lengthy testimony from the opposing expert backing his use of the corporate bond method.

The PBGC market-based approach was endorsed by the court: "The Court finds that the approach used by QDRO Consultants is the most fair and equitable method to determine a proper division of the parties' retirement benefits."[21]

The case was then appealed to the Third Appellate District which upheld the PBGC element of the decision.

Forman v. Forman, C.A. 9-13-67 3d (Ohio Ct. App Aug. 18, 2014).

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[15] *Beirele v. Joliot* at 16-17.
[16] *Beirele v. Joliot* at 17.
[17] *Beirele v. Joliot* at 18.
[18] *Beirele v. Joliot* at 19.
[19] *McClain v. McClain*, 693 A.2d 1355, 1997 Pa.Super. LEXIS (1997).
[20] *McClain v. McClain*, 693 A.2d 1355, 1997 Pa.Super. LEXIS (1997).
[21] *Forman v. Forman,* C.A. 12 DR 0159 (C.P. Marion County Oct. 28 2013) at 3.

The Third District rejected the first assignment of error which claimed the valuations done by David Kelley of QDRO Consultants using the PBGC were in error. The court made a careful review of the transcript and then said:

> "We conclude that the trial court did not abuse its discretion in determining that Kelley's valuation of Scott's and Michelle's pension and retirement benefits was the most equitable. The trial court heard the testimony of Kelley regarding the PBGC and IRC valuation methods used to calculate the present value of Scott's STRS pension benefits."[22]

4) Colan v. Colan, C. A. 06 DR A 06 0278 (C.P. Delaware County July 31, 2014).

Colan was a QDRO case where Magistrate David J. Laughlin had to decide whether to accept a QDRO prepared by QDRO Consultants Company or one proposed by the opposing expert. The issues raised in this case make it a valuable one to review.

Testifying for QDRO Consultants was David Kelley. As the Magistrate explained "the gist of the arguments in the case are 'legal arguments' regarding the interpretation of the clause in the divorce decree and the interpretation of the clauses in the proposed QDRO as being consistent as whether giving the plaintiff as an alternate payee to (SIC) little or too much of their share of the defendant's pension benefits…The issue is thus what should be included to make the QDRO provide the equitable division as agreed to by the parties."[23]

The *Colan* court had two alternatives to choose from:

> 1) Award the alternate payee a share of inherent COLAs, subsidies and supplements related solely to her frozen amount accrued during the marriage was argued for by QDRO Consultants.
> 2) Limit the alternate payee to the frozen benefit accrued at the time of the divorce and exclude all COLAs and supplements from the wife because they are post-divorce events was argued for by the opposition.

The court chose the QDRO Consultants' QDRO explaining:
"The proposed qualified domestic relations order submitted by the Plaintiff/alternate payee on or about May 24th 2013 is appropriate and more reflective of the Decree and the position of this Court. It shall be reviewed and approved for signature…"[24]

The logic adopted by the Court is especially interesting because it thoroughly rejected the concept that the alternate payee's share of a benefit is frozen solid even when the trial court

[22]*Forman v. Forman*, C.A. 9-13-67 3d (Ohio Ct. App Aug. 18, 2014) at 14-15.
[23]*Colan v. Colan*, C. A. 06 DR A 06 0278 (C.P. Delaware County July 31, 2014) at #5.
[24] *Colan* at Decision A.

seems to imply that the benefit awarded is frozen at that point. Consider these points made in the decision by Magistrate Laughlin. Read them carefully and recognize the magistrate's emphasis that the alternate payee is a co-owner of the benefit – even if it is a frozen benefit – and that does not preclude all inherent growth being awarded to the alternate payee.

1) "The marital portion that is segregated/divided, becomes the property of that respective spouse and each is entitled to full rights in his or her share." at #13

2)"The wife, in this case being the alternate payee, is entitled to a share of the husband's pension benefit accumulated during the course of the marriage…and that share of the pension includes whatever may have been available to husband during a (SIC) that period of time---and whatever may be available to both of them virtue of any other changes in the pension plan that would not be adding or detracting any of their specific Decree rights by virtue of the divorce of the parties (in other words the parties each become their own specific *'owner/participant/payee/beneficiary'* , and as such each accrues rights and obligations that are wholly separate <u>from each other</u> but pertain to the third-party plan and administrator." at #14

3) "The common sense interpretation of the provision is that the wife is entitled to that portion but the wife is also entitled to any additions or deletions on her share as in proportion as was separated mathematically as of the date of October 4, 2007…" at 15

4) "Thus what it does *not mean* is that <u>everything</u> accumulated from October 4, 2007 to the date of the proposed QDRO almost 5 ½ years later is automatically attributed to the husband and not the wife." at 16

5) "Otherwise accepting the husband's position clearly gives the husband greater rights than for the wife. The husband by virtue of retaining any of the *any and all accumulations* essentially receives wife's accumulations as well as defeating the purpose of the equal division regardless of whether the husband is still an active contributant to the plan. Wife is left with a set sum that she can't receive until some unknown date in the future essentially with a zero growth – the longer she has to receive her money the less she gets the more interest and accumulation on that sum goes to husband." at 17

6) "The division creates wife's individual (federally mandated) pension rights to <u>her own</u> account which is separated by virtue of the QDRO and the plan administrator. This would be no different in the separation of a bank account, for example…but she is an owner just the same and is entitled to the same benefits of ownership." at 19

7) "Again the magistrate realizes that this is not a defined contribution plan where it is a clearer definition of what the interest/benefit is---the rationale should be the same---that's the equitable division that the wife as the alternate payee is entitled to; equal

rights of 'ownership' on her share---and the right to have her share increase or decrease based on the terms of the Plan pertaining to the alternate payees." at 20

8) "…The decree is ambiguous when examining the issues even though it does not have to delineate exactly what the benefits of the plan are. The absence of a specific language implies that there is no limiting language --- the wife gets what the husband got at that time." at 23

9) "Moreover, assuming…that the decree *is* ambiguous there is no equitable reason to find that the benefit provided for in the divorce decree represents only the basic percent share of the plan up to October 2007 and nothing more. As a matter of law it is not equitable…The accrued benefits did not necessarily mean only the basic benefit of a calculated fractional method. The Fifth District Court of Appeals has supported the requirement that the court is in the appropriate position to construe any ambiguity in the Decree so as to carry out the equitable intention of the Decree itself." at 24

> **IMPORTANT NOTE:** Ponder a moment what the magistrate is saying and his next point will not come as a surprise. He is saying that ambiguous language should not be interpreted in a dogmatic, literal way when it arrives at a clearly inequitable result. In fact, if a court intends to divert from established equitable precedent, i.e. coverture as established in *Hoyt*, the burden rests of them to explain the deviation from a seemingly equitable result or the court should do the equitable thing. In essence, he is saying that the court should look at cases like this through the prism of cases such as *Hoyt v. Hoyt*, 53 Ohio St. 3d (1990) and not get trapped in literal interpretations which result in inequitable results when there is nothing in the record to indicate that they wished to deprive the non-participant of a well established right. In fact, we at QDRO Consultants have seen courts do exactly this at times when we thought that language in an old decree would be interpreted to be frozen as of that date.

10) "Frankly despite the testimony from both experts, the magistrate is not convinced that the benefit is properly couched as a pure 'frozen coverture" and not more properly treated as provided in the *Nappi* case." at 25

11) "Some case indicates that the specific term of the Decree governs in all respects---if the benefit is not specifically mentioned it does not exist. Other case law provides that the Court has wide discretion to address the ambiguities that are inherent between a Divorce Decree and in an order that more specifically effectuates it ("that fleshes it out"). In fact this Magistrate finds that the rationale for this ability has been most recently outlined by two other Districts (in addition to the 6/23/14 Nappi case from the 11th District), that is this Magistrate's conclusion, have provided sustained appropriate case law that is consistent (more recently illustrative) with the Fifth District (and with the intent of this Magistrate and Court) to provide an equitable result…Even more recently

the 12th District Court of Appeals for Warren County in *Jewett v. Jewett* (2014 Ohio 2343) (6/2/2014) clearly found that the proper interpretation of the defined benefit plan to be---instead of restrictive but rather *inclusive* of all plan benefits." at 27

Conclusion: Do not settle for a frozen benefit if the judgment entry is ambiguous. It would seem that a court that wishes to overturn the Ohio Supreme Court in *Hoyt* needs to say more than "the benefit being divided is that of the date of the divorce." Such statements are not a clear statement that the alternate payee is not to receive inherent growth on her share of the pension. Instead, they are more logically just ambiguous statements that were not intended as frontal assaults on the Ohio Supreme Court. For so many Courts of Appeal to accept ambiguous statements of a freeze as clear evidence that the trial court has just upended *Hoyt* with little or no explanation should be challenged. In other words, we are saying that ambiguous language should more rationally be looked at through the equitable prism of *Hoyt*.