FAMILY AND DOMESTIC RELATIONS LAW RIGHTS TO RETIREMENT, ANNUITY AND LIFE INSURANCE BENEFITS

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Retirement, Annuity and Life Insurance Benefit Planning
Family and Domestic Relations Law Rights to
Retirement, Annuity, and Life Insurance Benefits

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Introduction

Program Questions:

a) What is the difference in treatment if an individual decides to invest $10,000 in (1) a bank account, mutual fund, an annuity, or a life insurance policy, each in the individual's name, or (2) a similar asset through a tax-qualified plan or an IRA?

b) What is the difference in the treatment between those assets and the annuity most individuals possess, social security benefits?

c) What is the difference in the treatment of each of those assets if the individual is single, has a non-married partner, or is married?

Competing Equitable Principles that Often Create Family Law/Domestic Relations Issues:

The Importance of Meeting Family Obligations
The Societal Value of Retirement, Life Insurance and Annuity Benefits
The Sanctity of Contracts

"While cohabitation without marriage does not give rise to the property and financial rights which normally attend the marital relation, neither does cohabitation disable the parties from making an agreement within the normal rules of contract law" *Morone v. Morone*, 50 N.Y.2d 481 (N.Y. 1980), 413 N.E.2d 1154

Major Asset Types

Individual Bank Accounts
Individual Mutual Fund Accounts
Individual (Non-qualified) Annuity Benefits
Individual Life Insurance Benefits (Creator and Beneficiary)
Benefits from Tax-Qualified plans that are not ERISA or Federal Plans
Benefits from IRAs other than SEPs and SIMPLE Plans
Benefits from State and Local Pension Plans
Benefits from Federal Pension and Life Insurance Plans
Benefits from Railroad Retirement Plans
Benefits from Social Security

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I. New York State Spousal Rights and Child Support Rights

New York provides two distinct sets of family rights other than marital dissolution rights. During the life of an individual, the individual is obligated to support the individual's children and spouse. These obligations are enforceable regardless of otherwise applicable state-law debtor protections. They are entitled to no other benefits during the individual's life unless pursuant to a contract obligation. At the time of the individual's death, the individual's surviving spouse may elect to receive a sum equal to minimal part of value of the individual's property, to the extent the surviving spouse did not otherwise receive property of such value at the time of the individual's death. Unlike the right to support, which generally considers all items of income, including retirement, life insurance and annuity benefits, not all those items are included in the assets valued for this election. Similar contract obligations for unmarried partners are enforceable, but without the deference given to the statutory obligations.

A. Spousal and Child Support Rights

1. Spousal Support Rights

N.Y. Family Ct. Act § 412 Married person's duty to support spouse

A married person is chargeable with the support of his or her spouse and, if possessed of sufficient means or able to earn such means, may be required to pay for his or her support a fair and reasonable sum, as the court may determine, having due regard to the circumstances of the respective parties.

Conclusions from statutory text:

1) The support obligation applies only to members of a married couple, not to members of an unmarried arrangement. Cohabiting does not lead to a support obligation unless the obligation arises pursuant to a contract arrangement. Support arrangements during and after a marital dissolution are often determined under the similar provisions of the domestic relations law and often referred to as maintenance.

2) The law does not set forth specific standards with respect to the needs or means of either spouse, but refers to "the circumstances of the respective parties."

3) A spouse can waive the spousal support rights.

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Katz v. Katz, 37 A.D.3d 544, 830 N.Y.S.2d 268 (2d Dept. 2007) (holding a prenuptial agreement was valid, enforceable dispositive with respect to spousal support)

2. Child Support Rights

N. Y. Family Ct. Act § 413 Parents' duty to support child

1. (a) *Except as provided in subdivision two of this section [exempting children adopted by spouse after a marital separation], the parents of a child under the age of twenty-one years are chargeable with the support of such child and, if possessed of sufficient means or able to earn such means, shall be required to pay for child support a fair and reasonable sum as the court may determine.* The court shall make its award for child support pursuant to the provisions of this subdivision. The court may vary from the amount of the basic child support obligation determined pursuant to paragraph (c) of this subdivision [which permits a portion of non-recurring payments, such as life insurance proceeds to be allocated to child support] only in accordance with paragraph (f) of this subdivision [permitting adjustments if the result would be unjust or inappropriate].

(b) For purposes of this subdivision, the following definitions shall be used:

(1) "Basic child support obligation" shall mean the sum derived by adding the amounts determined by the application of subparagraphs two and three of paragraph (c) of this subdivision except as increased pursuant to subparagraphs four, five, six and seven of such paragraph. . . .

(5) "Income" shall mean, but shall not be limited to, the sum of the amounts determined by the application of clauses (i), (ii), (iii), (iv), (v) and (vi) of this subparagraph reduced by the amount determined by the application of clause (vii) of this subparagraph:

(i) gross (total) income as should have been or should be reported in the most recent federal income tax return. If an individual files his/her federal income tax return as a married person filing jointly, such person shall be required to prepare a form, sworn to under penalty of law, disclosing his/her gross income individually;

(ii) to the extent not already included in gross income in clause (i) of this subparagraph, investment income reduced by sums expended in connection with such investment;

(iii) to the extent not already included in gross income in clauses (i) and (ii) of this subparagraph, the amount of income or compensation voluntarily deferred and income received, if any, from the following

sources:

(A) workers' compensation,
(B) disability benefits,
(C) unemployment insurance benefits,
(D) social security benefits,
(E) veterans benefits,
(F) pensions and retirement benefits,
(G) fellowships and stipends, and
(H) annuity payments;

(iv) at the discretion of the court, the court may attribute or impute income from, such other resources as may be available to the parent, including, but not limited to . . .

(c) The amount of the basic child support obligation shall be determined in accordance with the provision of this paragraph:

[a child support percentage of the first $141,000 of the annual combined parental income up to $141,000 with the percentage depending on the number of children, such as 17% for one child, and 25% for two children, and the court shall determine the extent, if any, to which additional income should be allocated to support]

(e)Where a parent is or may be entitled to receive non-recurring payments from extraordinary sources not otherwise considered as income pursuant to this section, including but not limited to:

(1) Life insurance policies;

(4) Gifts and inheritances;

the court, in accordance with paragraphs (c), (d) and (f) of this subdivision may allocate a proportion of the same to child support, and such amount shall be paid in a manner determined by the court.

Conclusions from statutory text:

1) The support obligation does not depend upon the parents of the child being married. Child support arrangements during and after a marital dissolution are often determined under the similar provisions of the domestic relations law. N.Y. Dom Rel L. § 240.

2) The law sets forth specific standards with respect to the means of the parent, but will

modify those standards to obtain a just or appropriate amount.

3) The computation of the parent's income explicitly begins with the parent's gross income reportable on the parent's federal income tax returns and explicitly includes all retirement income and annuity income. The Court has discretion to decide the extent to which an irregular payment, such as life insurance proceeds, is directed to fulfilling the support obligation.

3. Enforcement of Support Rights

N.Y. C. P. L. R. § 5241 Income execution for support enforcement

(a) Definitions. As used in this section and in section fifty-two hundred forty-two of this chapter, the following terms shall have the following meanings: . . .

1. "Order of support" means any temporary or final order, judgment, agreement or stipulation incorporated by reference in such judgment or decree in a matrimonial action or family court proceeding, or any foreign support order, judgment or decree, registered pursuant to article five-B of the family court act which directs the payment of alimony, maintenance, support or child support.

5. "Income payor" includes

(i) the auditor, comptroller, trustee or disbursing officer of any pension fund, benefit program, policy of insurance or annuity;

(ii) the state of New York or any political subdivision thereof, or the United States; and

(iii) any person, corporation, trustee, unincorporated business or association, partnership, financial institution, bank, savings and loan association, credit union, stock purchase plan, stock option plan, profit sharing plan, stock broker, commodities broker, bond broker, real estate broker, insurance company, entity or institution.

6. *"Income" includes any earned, unearned, taxable or non-taxable income, benefits, or periodic or lump sum payment due to an individual, regardless of source, including wages, salaries, commissions, bonuses, workers' compensation, disability benefits, unemployment insurance benefits, payments pursuant to a public or private pension or retirement program, federal social security benefits as defined in 42 U.S.C. section 662(f) (2), and interest, but excluding public assistance benefits paid pursuant to the social*

services law and federal supplemental security income.

(b) Issuance. (1) When a debtor is in default, an execution for support enforcement may be issued by the support collection unit, or by the sheriff, the clerk of court or the attorney for the creditor as an officer of the court. Where a debtor is receiving or will receive income, an execution for deductions therefrom in amounts not to exceed the limits set forth in subdivision (g) of this section may be served upon an employer or income payor after notice to the debtor . . .

(g) Deduction from income. (1) *An employer or income payor served with an income execution shall commence deductions from income due or thereafter due to the debtor* no later than the first pay period that occurs fourteen days after service of the execution, and shall remit payments within seven business days of the date that the debtor is paid.

Conclusions from statutory text:

1) The statute is not limited to the enforcement of child support but applies to spousal support and may arise in either a matrimonial action or family court proceeding.

2) The enforcement limitations of N.Y. C. P. L. R. § 5205(c) and (d) are explicitly not applicable to orders to enforce child or spousal support obligations. N.Y. C. P. L R. § 5205(c).4.

3) As with the provision for the determination of child support, the obligation may be enforced against payors of retirement income and annuity income and of almost any other income to the parent/spouse with the support obligation, although benefits are only subject to support claims when the payments are due. Thus, there need be no consideration of the limitations on the enforcement of claims against annuities or state government pension benefits except to the extent the claimant may only obtain benefits to which the parent/spouse is entitled.

4) There is a question about the extent, if any, to which a parent or spouse may be compelled to request the payment of retirement or annuity benefits, which could otherwise continue to grow and not be subject to early payment penalties.

> *Cf. Aurora G. v. Harold Aaron G*, 98 Misc. 2d 695 (Fam. Ct., N.Y. Co. 1979) (holding prior to the enactment of N.Y. C. P. L. R. § 5241 that a parent could not be compelled to obtain support payments by beginning to receive payments before the scheduled commencement date of College Retirement and Equities Fund annuity payments).

B. Surviving Spouse Default and Elective Share Rights

N.Y. E. P. T. L. § 4-1.1. Descent and distribution of a decedent's estate

The property of a decedent not disposed of by will shall be distributed as provided in this section. In computing said distribution, debts, administration expenses and reasonable funeral expenses shall be deducted but all estate taxes shall be disregarded, except that nothing contained herein relieves a distributee from contributing to all such taxes the amounts apportioned against him or her under 2-1.8. Distribution shall then be as follows:

(a) If a decedent is survived by:

(1) A spouse and issue, fifty thousand dollars and one-half of the residue to the spouse, and the balance thereof to the issue by representation.

(2) *A spouse and no issue, the whole to the spouse*.

(3) Issue and no spouse, the whole to the issue, by representation.

Conclusions from statutory text:

1) There is a surviving spouse default designation, but the spousal share depends on whether any issue also survive the decedent.

2) The default designation provides the spouse with at least half of the probate estate subject to a $50,000 minimum.

3) If the decedent exercises his right to make the will or otherwise dispose of his property at the decedent's death, the surviving spouse is given the right to elect to obtain a minimum portion of the value of the decedent's probate estate and specified non-probate property as described below.

N.Y. E. P. T. L. § 5-1.1-A Spousal Survivor Benefit Rights

(a) Where a decedent dies on or after September first, nineteen hundred ninety-two and is survived by a spouse, a personal right of election is given to the surviving spouse to take a share of the decedent's estate, subject to the following:

(1) For the purpose of this section, the decedent's [Elective Share] estate includes the capital value, as of the decedent's death, of any property described in subparagraph (b) (1).

(2) The *elective share, as used in this paragraph, is the pecuniary amount equal to the greater of (i) fifty thousand dollars or, if the capital value of the net estate is less than fifty thousand dollars, such capital value, or (ii) one third of the net estate*. In computing the net estate, debts, administration expenses and

reasonable funeral expenses shall be deducted, but all estate taxes shall be disregarded, except that nothing contained herein relieves the surviving spouse from contributing to all such taxes the amounts apportioned against him or her under 2-1.8.

(b) Inter vivos dispositions treated as testamentary substitutes for the purpose of election by surviving spouse

(1) Where a person dies after August thirty-first, nineteen hundred ninety-two and is survived by a spouse who exercises a right of election under paragraph (a), the transactions affected by and property interests of the decedent described in clauses (A) through (H), whether benefiting the surviving spouse or any other person, shall be treated as testamentary substitutes and the capital value thereof, as of the decedent's death, shall be included in the net estate subject to the surviving spouse's elective right except to the extent that the surviving spouse has executed a waiver of release pursuant to paragraph (e) with respect thereto

(C) and (D) [*Totten and joint bank accounts*]

(F) *Any disposition of property or contractual arrangement made by the decedent, in trust or otherwise,* to the extent that the decedent (i) after August thirty-first, nineteen hundred ninety-two, retained for his or her life or for any period not ascertainable without reference to his or her death or for any period which does not in fact end before his or her death the possession or enjoyment of, or the right to income from, the property *except to the extent that such disposition or contractual arrangement was for an adequate consideration in money or money's worth [IRC § 2036]*[added 1992]; or (ii) at the date of his or her death retained either alone or in conjunction with any other person who does not have a substantial adverse interest, by the express provisions of the disposing instrument, *a power to revoke such disposition or a power to consume, invade or dispose of the principal thereof [IRC §§ 2038 and 2041] . . .*

(G) *Any money, securities or other property payable under a thrift, savings, retirement, pension, deferred compensation, death benefit, stock bonus or profit-sharing plan, account, arrangement, system or trust*, except that with respect to a plan to which subsection (a) (11) of section four hundred one of the United States Internal Revenue Code applies *[requiring tax-qualified trusts funding pension plans to provide spousal survivor and pension benefits]* or a defined contribution plan to which such subsection does not apply pursuant to paragraph (B) (iii) thereof, only to the extent of fifty percent of the capital value thereof.

> Notwithstanding the foregoing, a transaction described herein shall not constitute a testamentary substitute if the decedent designated the beneficiary or beneficiaries of the plan benefits on or before September first, nineteen hundred ninety-two and did not change such beneficiary designation thereafter.
>
> (I) A transfer of a security to a beneficiary pursuant to part 4 of article 13 of this chapter [*the transfer-on-death provisions for bank, security and brokerage account holders*]

Conclusions from statutory text:

1) The elective share is not enforced as a debt imposed on the recipients of testamentary substitutes; thus, limits on the enforcement of creditor's rights are not relevant. Instead, a surviving spouse's right of election gives the surviving spouse the right to receive money from the beneficiaries who received property included in the elective estate, rather than a share of the assets themselves. N.Y. E. P. T. L. § 5-1.1-A(c)(2). This amount is often called the surviving spouse's elective share.

> *See Estate of Bessie Daniello*, 2000 N.Y. Misc. LEXIS 699 (Sur. Ct., Bronx Co. Nov. 28, 2000) ("The elective share only gives the surviving spouse the right to receive a pro rata contribution from petitioner" thus the recipient of the real property at issue may sell it or not as long as the recipient pays his share of the elective share)

2) A surviving spouse's right of election is not affected by whether the decedent leaves a will or any probate estate. The right of election applies to the decedent's elective estate, which is defined to include the probate estate, if any, and many testamentary substitutes.

3) A surviving spouse's right of election is not affected by whether the decedent obtained the property before or after the marriage. Nor is it affected by whether the property would be treated as marital property or separate property for purposes of a marital dissolution. In all cases, the surviving spouse's elective share is basically one-third of the value of the elective estate.

4) A surviving spouse's right of election is not affected by the length of the marriage. Whether married for five minutes or fifty years, the surviving spouse is entitled to the same elective share. In all cases, the surviving spouse's elective share is basically one-third of the value of the elective estate.

5) Inclusion of an item in the elective estate enhances the surviving spouse's elective share if the spouse is entitled to less than one third of the value of the item, and diminishes it otherwise. In particular, if an item passes wholly to a person other than the surviving spouse, her elective share increases if the item is included. If it is excluded, her elective share decreases. However, if

the item passes wholly to the surviving spouse, her elective share decreases if the item is excluded. If it is excluded, her elective share increases.

For example, suppose the elective estate has a $ 900,000 value, but none goes to the surviving spouse. The surviving spouse would have a right to $300,000 from the recipients of the elective estate. This entitlement is not affected by who obtained $90,000 of property excluded from the elective estate.

If the surviving spouse obtained the $90,000, he would be entitled to property with a value of $390,000.

However, if the additional $90,000 were included in the elective estate, his elective share would be 1/3 of $ 990,000, *i.e.*, $330,000. Thus, he would lose $60,000 from such inclusion.

If the $90,000 had gone to another person its inclusion in the elective share would increase his elective share from $300,000 to $330,000.

6) A surviving spouse's right of election is personal. N.Y. E. P. T. L. § 5-1.1-A(c)(3). It may be exercised by an attorney-in-fact with a power of attorney but not by the personal representative of the surviving spouse's estate.

In re Estate of Lando, 11 Misc. 3d 866, 809 N.Y.S.2d 901 (Sur. Ct., Rockland Co. 2006) (attorney-in-fact under durable short statutory POA may exercise right of election without any consultation with the guardian of an incapacitated surviving spouse); *In re Estate of Crane*, 170 Misc. 2d 97, 649 N.Y.S.2d 1006 (Sur. Ct. Erie Co. 1996) (guardian of decedent's deceased spouse may not exercise right of election even though prior to death the guardian was in process of preparing to request court approval to file an election against the decedent's will).

7) Assuming that an individual does not run afoul of the gifts *causa mortis* inclusion the individual may defeat his or her spouse's elective right by simply giving away property prior to one's death.

8) A surviving spouse's right of election differs in four significant ways from the default right of a decedent's surviving spouse to the decedent's intestate estate under N.Y. E. P. T. L. § 4-1.1:

(a) the share does not depend upon whether there are any surviving issue of the decedent's family;

(b) the surviving spouse's elective share is a portion of the value of the decedent's elective estate, rather than a portion of the probate estate;

(c) the elective share portion is basically one-third rather the default portion of

one half or all; and

(d) the elective share must be elected, it is not an automatic default result. Thus, an election will only occur if the surviving spouse receives property in the elective estate worth less than one third of the value of such estate, and if not elected within the statutory period lapses.

N.Y. E. P. T. L. § 5-3.1. Exemption for benefit of family

(a) *If a person dies, leaving a surviving spouse or children under the age of twenty-one years, the following items of property are not assets of the estate but vest in, and shall be set off to such surviving spouse*, unless disqualified, under 5-1.2, from taking an elective or distributive share of the decedent's estate. In case there is no surviving spouse or such spouse, if surviving, is disqualified, such items of property vest in, and shall be set off to the decedent's children under the age of twenty-one years: . . .

(6) Money including but not limited to cash, checking, savings and money market accounts, certificates of deposit or equivalents thereof, and marketable securities, not exceeding in value twenty-five thousand dollars, reduced by the excess value, if any, of acquired items referred to in subparagraphs (1), (2), (3) and (5) of this paragraph. However, where assets are insufficient to pay the reasonable funeral expenses of the decedent, the personal representative must first apply such money to defray any deficiency in such expenses.

Conclusions from statutory text and case-law:

1) The family exemption statute provides a surviving spouse with a vested right to $92,500 of specified property: (1) household goods with a value up to $20,000; (2) books and storage tapes with a value up to $2,500; (3) domestic or farm animals with a value up to $20,000; (4) cars with a value up to $25,000; and (5) cash and marketable securities with a value up to $25,000.

2) These family exemption set offs do not affect the ability to settle small estates without administration. N.Y. S. C. P. A. § 1301.1.

3) Waivers of the right to family exemption must be quite explicit.

See, e.g., *In re Marrone*, 36 Misc. 3d 225, 944 N.Y.S.2d 835 (Sur. Ct., Queens Co. 2012) (holding that waiver of all rights as surviving spouse and treatment as other spouse as predeceasing decedent sufficient to waive family exemption right).

4) Property set off for the surviving spouse is not part of the elective estate.

See e.g., *In re Estate of Heede*, 29 Misc. 2d 103, 210 N.Y.S.2d 947 (Sur. Ct., Kings Co. 1961) (holding that personal effects subject to the family exemption not included in elective estate).

C. Spousal Protections for Benefits from Totten Bank Accounts and Payable-on-Death Accounts

Totten bank accounts and payable-on-death bank, brokerage or securities accounts are not required to give a surviving spouse a default interest in such accounts.

However, a decedent's elective estate includes the survivor benefits from Totten bank accounts and payable-on-death bank, brokerage or securities accounts. By being included in the elective estate they increase the value of the funds to which the surviving spouse may be entitled and thereby provide spousal benefits even though this may diminish his or her entitlement if he or she is entitled to a large share of these funds. This is consistent with the elective share paradigm that the surviving spouse is not given an interest in any of the decedent's specific assets but a fraction of the value of the decedent's assets.

D. The Spousal Protections for Benefits from Pension Plans subject to Code § 401(a)(11)

A decedent's elective estate includes the decedent's survivor benefits under a thrift, savings, retirement, pension, deferred compensation, death benefit, stock bonus or profit-sharing plan, account, arrangement, system or trust. It is irrelevant whether the plan is funded with a trust, or contracts with an insurance company. Moreover, the plan may be unfunded as is the case with many deferred compensation arrangements. This is consistent with the elective share paradigm that the surviving spouse is not given an interest in any of the decedent's specific assets but a fraction of the value of the decedent's assets.

However, the elective estate includes only 50% of the survivor benefit plan to which Section 401(a)(11) of the Internal Revenue Code of 1986, as amended (the "Code") "applies" or a defined contribution plan to which such subsection does not apply pursuant to paragraph (B)(iii) thereof. Code § 401(a)(11) provides a participant's spouse with benefits during the participant's life, *i.e.*, while the participant receives plan benefits, and at the participant's death,

survivor benefits. The section generally requires that a plan funded by a tax-qualified trust to provide retirement and pre-retirement benefits in the form of a joint and 50% survivor benefit and requires a spousal waiver before plan distributions or loans are made to a participant. This means that 50% of the value of a defined contribution plan subject to the requirement would go to the surviving spouse. These requirements do not apply to a profit-sharing plan that provides that if a participant dies before receiving his entire account balance then the participant's date of death balance is paid to the surviving spouse, if any. If the surviving spouse obtains only half of the decedent's survivor benefit, a question arises whether to exclude that payment as well as the such benefit from the computation of the difference between the surviving spouse's elective share and the value of the elective estate assets received by the surviving spouse. If the payment is excluded, the surviving spouse would be entitled to half of the survivor benefit under Code § 401(a)(11) and one third of the other half under the elective share rules, *i.e.*, two thirds of the survivor benefit.

Cf. In re Estate of Aubrey Cohen, 2001 N.Y. Misc. LEXIS 1347 (Sur. Ct., N.Y. County. Jan. 22, 2001) (holding that and explaining why the elective estate excludes both the 50% of the profit-sharing interest and 50% payment of the interest to the surviving spouse); Donald P. Partland, *Calculating the Value of Qualified-Plan Benefits in Determining the Surviving Spouse's Elective Share*, 38 NYSBA Trusts and Estates Newsletter 9 (Fall 2005) (arguing against this statutory approach and the court's rationale for the approach); and David A. Pratt, *Special Issues Regarding Life Insurance, Annuities and Retirement Benefits*, 36 NYSBA Trusts and Estates Section Newsletter, 17, at 30-32 (Summer 2003) (arguing against the statutory approach and asserting that the plan at issue was not subject to the Code § 401(a)(11) requirement).

The Code § 401(a)(11) requirement does not apply to Code § 403(b) annuity plans which are often maintained by public schools or tax-exempt organizations, although the *Cohen* court held that it sufficed that a similar ERISA requirement applied to such a plan under ERISA. Nor does it apply to individual retirement accounts, which are included in the elective estate.

Briggs v. Hemstreet-Briggs, 268 A.D.2d 644, 701 N.Y.S.2d 178 (App. Div. 3rd Dep't. 2000) (IRA assets are part of the elective estate)

E. Spousal Protections for Benefits from Life Insurance and Annuity Benefits

Individual annuity contracts that are part of pension plans or profit-sharing plans would be

for the purpose of providing plan benefits. Thus, they would be included in an individual's elective estate. If the plan is subject to the Code § 401(a)(11) spousal benefit requirements, the 50% rule is applicable.

Individual life insurance policies in such plans must be incidental to the provision of retirement benefits or deferred compensation benefits. Treas. Reg. § 1.401-1(b)(1). Thus, they would not appear to be subject to any of the Code § 401(a)(11) spousal benefit requirements even if the requirements apply to the plan's retirement benefits.

Individual life insurance policies and annuity contracts that are not part of pension plans or profit-sharing plans are not subject to Code § 401(a)(11) requirements. There is no comparable state provision giving surviving spouses a default survivor or death benefit from such policies or contracts. Thus, these policies or contracts need not provide spousal survivor benefits, and often do not. The same is true of group life policies which need not provide spousal default benefits.

The predecessor of the current elective share statute explicitly excluded annuity contracts or life insurance policies from the elective estate. N.Y. E. P. T. L. § 5-1.1(b)(2). There is no such exclusion in the current statute, but there seems to be no section explicitly including those assets that are not part of pension or profit-sharing plans.

There is a new section which arguably includes annuity contracts and life insurance policies. N.Y. E. P. T. L. § 5-1.1-A(b)(2)(F). That section appears to have been inspired by Code §§ 2036, 2038, and 2041, which include trust interests in a decedent's federal taxable estate in because the decedent retained too many ownership rights in those interests at his or her death such as respectively, the right to a life estate, the right to revoke the transfer of the interest, and the right to exercise a general power of appointment over the interest. Annuities on the decedent's life and life insurance plans generating income would seem to be included within the first item as a contractual right for income for decedent's life if the exception for adequate consideration is disregarded. However, there seems to be no basis for such disregard and annuities do not pay out only income. Life insurance in which the decedent retains the right to choose beneficiaries or the right to obtain the cash surrender value would seem to be included within the second item, which is very similar to a provision of the predecessor of the current elective share statute. N.Y. E. P. T. L. § 5-1.1(b)(1)(E). However, life insurance is not usually obtained by a disposition of property in which some principal is put aside but rather by a contractual arrangement. Thus, the second item does not appear to be applicable unless the policy or the annuity contract is disposed of by a contribution to a trust. *See generally* First Report of the EPTL-SCPA Legislative Advisory Committee (March 18, 1991) (the "Radigan Report"), *as reprinted* in LINDA B. HIRSCHSON ET AL., XIII WARREN'S HEATON ON SURROGATE'S COURT PRACTICE App 1-1-1-73(7th ed. 2015).

The courts seem to have decided that life insurance policies are excluded from the elective estate, whereas annuity contracts are included in the elective estate. By being included in the

elective estate, annuities increase the value of the funds to which the surviving spouse may be entitled and thereby provide spousal benefits even though this may diminish his or her entitlement if he or she is entitled to a large share of these funds. In contrast, life insurance policies, which are not so included, do not have these effects.

Estate of Clifford J. Boyd, 161 Misc. 2d 191 (Sur. Ct., Nassau Co. 1994) (holding by Judge Radigan that life insurance is excluded because the legislative history of the current elective share statute adopted in 1992 (L. 1992, ch 595, § 10) shows that the legislature wished to continue to exclude life insurance from the elective estate, in this case the exclusion benefitted the surviving spouse who was the beneficiary of the life insurance and could disregard the transfer in determining her elective share); *In re Callaghan*, 1994 N.Y. Misc. LEXIS 740 (Sur. Ct., Dutchess Co. Sept. 23, 1994) (holding that group term life proceeds payable to the decedent's son were not included in the elective estate because of deference to *Boyd* rather than analysis of text, which indicated life insurance was included in the estate) and *Estate of Alice Green*, 2008 N.Y. Misc. LEXIS 728 (Sur. Ct., Bronx Co. Jan. 22, 2008) (holding that the proceeds of a veterans' life insurance policy are in elective estate despite apparent inclusion of life insurance in text because "However, considering that more than 15 years have elapsed since E.P.T.L. § 5-1.1-A became effective, during which period [two] numerous cases have held that life insurance is not a testamentary substitute, and the Legislature has not amended the statute to change the judicial determinations, it would be tantamount to judicial legislation for this court, at this time, to reach a contrary result.")

Estate of Zuppa, 48 A.D.3d 1036 (N.Y. App. Div. 4th Dept. 2008) (holding that annuities paid to the decedent's son rather than his impecunious widow were part of the elective shares because the decedent was receiving income from the annuities before his death, which income terminated at his death pursuant to the terms of N.Y. E. P. T. L. § 5-1.1-A(b)(2)(F)). *Cf. Estate of Becklenberg v. C.I.R.*, 273 F.2d 297 (7th Cir. 1959) (holding that annuity in trust not included in estate under Code § 2036 because grantor did not retain income interest in annuity but payment obligation which was independent of income of annuity contract)

F. Spousal Protections for Benefits from Government Pension and Life Insurance Plans

Tax-qualified New York State government retirement plans are not subject to Code § 401(a)(11) because of the final sentence of such section. Thus, tax-qualified government pension plans need not provide spousal benefits during the participant's life or at the participant's death.

Nor do they make spouses the default beneficiaries. For example, the default pension benefit under the New York State Teachers' Retirement System is a single life annuity. N. Y. EDUC. L. §§ 510, 511, 511-a, and 512-a. Thus, there would be no survivor benefits to be included in a decedent's elective estate. However, the participant may choose to have his or her benefit paid in a joint and survivor annuity with his spouse as the beneficiary. N. Y. EDUC. L. § 513. The default pre-retirement survivor benefit is allocated solely to his estate, but the participant may choose to have the benefit paid to another person, including but not restricted to the participant's surviving spouse. N. Y. EDUC. L. § 512. The same is true for any pre-retirement survivor benefit. N. Y. EDUC. L. § 512. Thus, a decedent's elective estate includes the survivor benefits from government pension plans.

By being included in the elective estate the government survivor benefits increase the value of the funds to which the surviving spouse may be entitled and thereby provide spousal benefits even though this may diminish his or her entitlement if he or she is entitled to a large share of these funds. The anti-assignment provisions of such plans do not affect this elective share right.

> *See, e.g.*, *Estate of Monique Ellison*, 2011 N.Y. Misc. LEXIS 7251 (Sur. Ct., Bronx Co. March 23, 2011) (surviving spouse entitled to one third of decedent's survivor benefit from the New York City Employees Retirement System).

New York government group life insurance benefits are excluded from the elective estate if life insurance benefits are so excluded. As with pension benefits there is no requirement that an employee choose the employee's surviving spouse as the beneficiary if the beneficiary. Similarly, the default beneficiary for New York State group life insurance benefits is the employee's estate. N.Y. RETIRE & SOC. SEC. L. § 60 (c).

G. Spousal Elective Share Waivers

N.Y. E. P. T. L. § 5-1.1-A Spousal Survivor Benefit Right Waivers

(a)

(4) The share of the testamentary provisions to which the surviving spouse is entitled hereunder (the "net elective share") is his or her elective share, as defined in subparagraphs (1) and (2), *reduced by the capital value of any interest which passes absolutely from the decedent to such spouse, or which would have passed absolutely from the decedent to such spouse but was renounced by the spouse*, (i) by intestacy, (ii) by testamentary substitute as described in subparagraph (b) (1), or (iii) by disposition under the decedent's last will.

(e) Waiver or release of right of election.

(1) *A spouse, during the lifetime of the other, may waive or release a right*

of election, granted by this section, against a particular or any last will or a testamentary substitute, as described in subparagraph (b) (1) made by the other spouse. A waiver or release of all rights in the estate of the other spouse is a waiver or release of a right of election against any such last will or testamentary provision.

(2) *To be effective under this section, a waiver or release must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property*.

(3) Such a waiver or release is effective, in accordance with its terms, whether:

A) *Executed before or after the marriage of the spouses*.

(B) Executed before, on or after September first, nineteen hundred sixty-six.

(C) Unilateral in form, executed only by the maker thereof, or bilateral in form, executed by both spouses.

(D) *Executed with or without consideration*.

(E) Absolute or conditional.

(4) If there is in effect at the time of the decedent's death a waiver, *or a consent to the decedent's waiver*, executed by the surviving spouse with respect to any survivor benefit, or right to such benefit, under subsection (a) (11) of section four hundred one or section four hundred seventeen of the United States Internal Revenue Code [*requiring tax-qualified pension plans to provide spousal survivor pension benefits*], then *such waiver shall be deemed to be a waiver within the meaning of this paragraph (e) against the testamentary substitute constituting such benefit*.

Conclusions from statutory text:

1) A waiver or release of a surviving spouse's elective share must meet formalistic requirements. It must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property.

See Matisoff v. Dobi, 90 N.Y.2d 127, 681 N.E.2d 376 (N.Y. 1997) (describing the significance and terms of the requisite acknowledgment "This requires both that [in

New York] an oral acknowledgment be made before an authorized officer and that a written certificate of acknowledgment be attached .")

2) A waiver or release of a surviving spouse's elective share need not satisfy any explicit requirements, such as the disclosure of specified financial data. Governor Patterson vetoed legislation to such effect on March 30, 2010. (McKinney's 2015 E.P.T.L. § 5-1.1A (2015 Supp.at 22).

> *Van Kipnis v. Van Kipnis*, 11 N.Y.3d 573, 577, 900 N.E.2d 977, 980 (N.Y. 2008) (holding that prenuptial calling for a separate property regime rather than equitable distribution was effective upon divorce because "It is well settled that duly executed prenuptial agreements are generally valid and enforceable given the "strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements"); *But see In re Brykczynski's Will*, 81 N.Y.S.2d 61 (Sur. Ct., N.Y. Co. 1948) (waiver not effective "in view of the manifest inequality between the parties, the fact that petitioner acted without counsel and did not understand the object and effect of the waiver coupled with the failure to make a frank and full disclosure of all the relevant facts and circumstances and the misrepresentations made to her.")

3) A waiver, or a consent to the decedent's waiver of the spousal survivor benefit that would otherwise be available pursuant to Code § 401(a)(11) need not comply with the rules for waivers of elective shares but with the rules set forth pursuant to Code § 417(a). Those rules require that the participant's spouse acknowledge the effect of the waiver of the participant's spousal benefit, and the participant be given extensive information about the implications of the plan benefit waiver.

4) Waivers of the right of election may also be made pursuant to the Domestic Relations Law which requires the same formality of execution as the above provision, and also imposes no substantive standards on such agreement.

N.Y. DOM. REL. LAW § 236 pt. B

> 3. Agreement of the parties. An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. Notwithstanding any other provision of law, an acknowledgment of an agreement made before marriage may be executed before any person authorized to solemnize a marriage pursuant to subdivisions one, two and three of section eleven of this chapter. Such an agreement may include (1) a contract to make a testamentary provision of any

kind, or a waiver of any right to elect against the provisions of a will; . . . .

Conclusions from statutory text:

Prior to the 1980 introduction of equitable distribution (l. 1980 ch. 281), which explicitly permits a separation agreement to affect rights of election as shown above, the courts were divided about whether separation agreements could affect the right of election of a later spouse of a divorced party.

> *See, e.g., Estate of Dunham*, 63 Misc. 2d 1029 (Sur. Ct. Greene Co. 1970) (holding pre-equitable distribution law separation agreement to provide for first wife does not defeat later wife's right of election) and *Rubenstein v. Mueller*, 19 N.Y.2d 228 (N.Y. 1967) (holding joint will agreement to provide for first wife defeats later wife's right of election because of difference in character of contract in separation agreement and joint will agreement).
>
> *Cf. In re Estate of Calligaro*, 19 Misc. 3d 895, 855 N.Y.S.2d 873 (Surr. Ct., Bronx Co. 2008) (holding post-equitable distribution law separation agreement to provide parties' daughter with survivor rights in local government pension until the daughter's age of emancipation trumps surviving spouse's right of election, but that election right is exercisable to the extent of the value of the survivor benefits that may be expected to be available beyond such age).

H. Contracts re Testamentary and Non-Testamentary Dispositions Other than Elective Share Waivers

N.Y. E. P. T. L. § 13-2.1. Agreements involving a contract to establish a trust, to make a testamentary provision of any kind, and by a personal representative to answer for the debt or default of a decedent, required to be in writing

(a) Every agreement, promise or undertaking is unenforceable unless it or some note or memorandum thereof is in writing and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

(1) Is a contract to establish a trust.

(2) *Is a contract to make a testamentary provision of any kind*.

(3) Is a promise by a personal representative to answer for the debt or default of his decedent.

Conclusions from statutory text:

1) An agreement to make a testamentary disposition must be in writing but the statute like the one for waiving a surviving spouse's elective share has no substantive requirements. However, the courts are very reluctant to find agreements to make a testamentary disposition.

> *See The American Committee for the Weizmann Institute of Science v. Dunn,* 10 N.Y.3d 82 (N.Y. 2008) (holding a contract to make a testamentary disposition or to refrain from doing so "demands the most indisputable evidence of . . . agreement" which was not present with respect to a contract to make a charitable contribution of the proceeds from the sale of a cooperative apartment at issue).

2) No statutes govern contracts for non-testamentary dispositions, such as an agreement to make a beneficiary designation for a non-testamentary asset such as for a retirement plan or life insurance policy. Such agreements may be effective, although they may only be enforceable against the decedent's estate rather than the designee, who is often protected by statute from claims of the decedent's creditors.

> *See, e.g., Caravaggio v. Retirement Board of the Teachers Retirement System of the City of New York*, 36 N.Y.2d 348 (N.Y. 1975) (holding that N.Y. EDUC. L. § 524, the anti-assignment provision for teachers retirement benefits, preempted a pre-equitable distribution law separation agreement incorporated in a divorce decree that required a beneficiary designation, but the former spouse provision may have a contract claim against the decedent's estate).

3) A contract re the disposition of proceeds from payable on death accounts may be enforced against either the entity with the account if timely notice is given to the entity or the recipient of the proceeds. N.Y. E. P. T. L. § 13-4.8. Even if the account terms do not permit assignments, the claim may be pursued as a creditor of the decedent's estate.

I. Contracts re Lifetime Payments, Testamentary and Non-Testamentary Dispositions for Unmarried Partners

Courts will enforce cohabitation agreements between unmarried partners with respect to beneficiary designations, lifetime payments, or dividing property, although the lack of a fiduciary relation between the unmarried parties means that the courts may be more deferential to the terms

of such an agreement than to one between married parties.

See Leicht v. Carretta, 23 Misc. 3d 1117(A) (Sup. Ct., Suffolk Co. 2009) (discussing when New York will enforce cohabitation agreements and when constructive trusts result from such agreements will be imposed on the property of a partner's property including being treated as the partner's 401(k) interest, although there was no discussion of the implications of ERISA on such an obligation); *Silver v. Starrett*, 674 N.Y.S.2d 915 (Sup. Ct., N.Y. Co. 1998) (discussing the different standards for reviewing separation agreement between a married couple and one by an unmarried one and finding the one at issue was binding including the obligation to make contributions to the other party's pension plan).

However, contract obligations between unmarried partners are not given the same enforcement deference of the family obligations discussed above. Thus, there is often a practical question whether there are assets against which the non-marital obligation may be enforced and contract obligations may not.

*See In re Monique Ellison, 2*011 N.Y. Misc. LEXIS 7251 (Sur. Ct. Bronx Co. March 23, 2011) (surviving spouse has right to one third of value of elective estate which consisted solely of NYCERS survivor benefit of $210,000). In contrast, the assignment prohibition wold prevent the enforcement against the plan of an agreement to provide what would have been the elective share to an unmarried partner in the same circumstances. Moreover, the prohibition would prevent enforcement against the beneficiary and the decedent had no other assets against which the obligation could be enforced.

II. Spousal and Child Support Rights Under Federal Laws Governing Federal Retirement, Life Insurance, and Annuity Benefits

Federal laws, other than ERISA, governing federal retirement, life insurance, and annuity benefits preempt state laws that conflict with the federal plan terms. The federal laws generally require federal plans to defer to state support orders. Moreover, spouses are generally entitled to the entire survivor benefits of the employee's retirement benefits at the time of the employee's death, absent a spousal waiver. In contrast, although there are default spousal designations for federal life insurance benefits, the spouse need not consent to a different designation. For ease of discussion, we will focus primarily on the federal retirement benefits from the Civil Service Retirement System ("CSRS"), although there is similar treatment under the Federal Employment Retirement System ("FERS"), the Federal Thrift Plan, and the military retirement system. For ease of discussion, we will focus primarily on the federal life insurance benefits under the Federal Employees' Group Life Insurance Act ("FEGLIA"), although there is similar treatment under the

military insurance system, the Servicemen's Group Life Insurance Act ("SGLIA"). We will also focus on the processing of civilian benefit requests by the Office of Personnel Management ("OPM").

A. Supremacy Clause

U.S. CONST. art. VI, cl. 2.

This Constitution, and the *Laws of the United States* which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be *the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

Conclusions from statutory text:

The Supremacy Clause implies that federal laws for the protection of federal benefits supersede conflicting domestic relations and marital rights state laws. The difficulty is identifying when there is a conflict between the state and federal laws. In some cases, federal statutes explicitly defer to such state laws.

B. Federal Deference to Enforcement of State Law Support Obligations

42 U.S.C. § 659. Consent by the United States to income withholding, garnishment, and similar proceedings for enforcement of child support and alimony obligations.

(a) Consent to support enforcement. Notwithstanding any other provision of law (*including section 207 of this Act* [42 U.S.C. § 407] and section 5301 of title 38, United States Code) [*Veteran's benefits*], effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the Armed Forces of the United States, *shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person*, to withholding in accordance with State law enacted pursuant to subsections (a)(1) and (b) of section 466 [42 U.S.C. § 666(a)(1), (b) pertaining to child support] and regulations of the

Secretary under such subsections, and to any other legal process brought, by a State agency administering a program under a State plan approved under this part [42 U.S.C. §§ 651 et seq. pertaining to child support] or by an individual obligee, *to enforce the legal obligation of the individual to provide child support or alimony*.

Conclusions from statutory text:

1) The statute, like N.Y. C. P. L. R. § 5241 for the state-law enforcement of marital and child support, seems to be all-encompassing.

2) The statute seems to apply to the payment of all federal retirement and life insurance benefits.

3) The statute addresses the enforcement of "the legal obligation of the individual to provide child support or alimony," whereas N.Y. C. P. L. R. § 5241 addresses the enforcement of "the payment of alimony, maintenance, support or child support." The significance of this difference is unclear.

26 § 6305. Collection of certain [non-tax] liability.

(a) In General. Upon receiving a certification from the Secretary of Health and Human Services, under section 452(b) of the Social Security Act [42 U.S.C. § 652(b)] with respect to [the child support obligation delinquency of] any individual, the Secretary shall assess and collect the amount certified by the Secretary of Health and Human Services in the same manner, with the same powers, and (except as provided in this section) subject to the same limitations as if such amount were a tax imposed by subtitle C [26 U.S.C. §§ 3101 et seq.] the collection of which would be jeopardized by delay, except . . .

> (2) for such purposes, paragraphs (4), *(6) [the exemption for railroad retirement benefits]*, and (8) of section 6334(a) [26 U.S.C. § 6334(a)] (relating to property exempt from levy) shall not apply.

Conclusions from statutory text:

1) The statute provides that a delinquent child support obligation certified by the Department of Health Education and Welfare may be enforced as if such amount were a Federal income tax the collection of which would be jeopardized by delay.

2) The Section 6334 limited railroad retirement benefit tax levy exemption is not applicable to child support levies.

C. Federal Social Security Spousal and Contractual Benefit Rights

1. Social Security Spousal Benefit Rights

Spousal benefits do not diminish a worker's social security benefits. 42 U.S.C. § 402(a). In contrast, most private annuity contracts reduce an annuitant's benefits if the annuitant chooses to obtain a joint and survivor benefit rather than a single life annuity. However, such benefits are available only if the spouse's social security benefits from her or his covered work are less than those spousal benefits. 42 U.S.C. § 402(b)(D). However, if the worker has filed for social security benefits, and the spouse has reached the spouse's full retirement age she can receive the spousal benefit not withstanding her greater social security benefits if she postpones receiving her own social security benefit until a later date. *Id.*

To qualify for spousal benefits, payable as an annuity during the worker's lifetime, the person (excluding divorced former spouses) must be the spouse at the time of the application and (a) have been married to the worker for at least one continuous year just before the worker filed the application for benefits; or (b) be the parent of the worker's biological son or daughter, even if the child is no longer living. 42 U.S.C. §§ 402(b), 402(c), 416(b) and (c).

To qualify for spousal death benefits, payable as an annuity during the survivor's lifetime, the person (excluding divorced former spouses) must (a) have been married to the worker for at least nine months before the worker died; (b) be the parent of the worker's biological son or daughter, even if the child is no longer living, or (c) legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (d) legally adopted her son or daughter while she was married to him and while such son or daughter was under the age of eighteen, or (e) be married to him at the time both of them legally adopted a child under the age of eighteen. 42 U.S.C. §§ 402(e), 402(f), 416(e) and (f). There are also provisions for survivor benefits for a worker's surviving minor children or surviving parents, who were dependent upon the worker at the time of his death. 42 U.S.C. §§ 402(d) and (h).

2. Social Security Survivor Benefits Are Not Part of Elective Estate

New York may not and does not include social security benefits in a decedent's elective estate. This omission could be in recognition of the fact that social security uses a different spousal benefit paradigm than the elective share paradigm. Spousal benefits are associated with social security survivor benefits, regardless of the value of the decedent's other property.

Cf. Free v Bland, 369 U.S. 663 (1962) (holding that the federal law with

respect to the ownership of U.S. savings bonds preempted attempts by state community property law to establish an ownership interest in those bonds, the proceeds of those bonds, or other funds of the owner of the bonds under federal law).

3. Lack of Partnership Contractual Rights to Social Security Benefits

42 U.S.C. § 407. Assignment; amendment of section.
[Social Security Act § 207]

(a) The right of any person to any future payment under this title [42 U.S.C. §§ 401 et seq.] shall not be transferable or assignable, at law or in equity, and *none of the moneys paid or payable or rights existing under this title* [42 U.S.C. §§ 401 et seq.] *shall be subject to execution, levy, attachment, garnishment, or other legal process*, or to the operation of any bankruptcy or insolvency law.

Conclusions from statutory text:

The Social Security Administration will not recognize a contract by unmarried partners regarding the allocation of social security benefits. Moreover, contracts by a recipient of social security benefits to allocate benefits to a partner may not be enforced against the recipient's social security payments or other funds.

D. Federal Pension and Life Insurance Spousal and Contractual Benefit Rights Other than those Established by ERISA

1. Federal Pension Spousal Benefit Rights

As with social security there are family survivor benefits that are not available to non-family members of federal employees and do not affect the worker's retirement benefits. In particular, there is a survivor annuity payable to surviving spouses of federal civilian employees with 18 months service who pass away before their retirement. **5 U.S.C. § 8341(d).** There are also pre-retirement survivor benefits for the employee's minor children. **5 U.S.C. § 8341(e)(2).** Unlike the Social Security definition, marriage is required to establish spousal rights. **5 U.S.C.§ 8341(a)**. There are no provisions for the payment of these survivor benefits to persons

other than the participant's "spouse" or children.

5 U.S.C. § 8339. Computation of [Civil Service Retirement System] annuity

(j) (1) The [retirement] annuity computed under subsections (a)-(i), (n), (q), (r), and (s) (or a portion of the annuity, if jointly designated for this purpose by the employee or Member and the spouse of the employee or Member under procedures prescribed by the Office of Personnel Management) for an employee or Member who is married at the time of retiring under this subchapter [5 U.S.C. §§ 8331 et seq.] is reduced as provided in paragraph (4) of this subsection in order to provide a survivor annuity for the spouse under section 8341(b) of this title [5 U.S. C. § 8341(b)], *unless the employee or Member and the spouse jointly waive the spouse's right to a survivor annuity in a written election filed with the Office at the time that the employee or Member retires*.

Conclusions from statutory text:

Federal retirement plans, unlike New York governmental plans provide default spousal benefits. Other federal retirement programs, such as the federal thrift plan, have similar spousal benefit provisions. 5 U.S.C. § 8435. Unlike social security these spousal death benefits diminish the lifetime benefits of the federal employee.

5 C.F.R. § 831.614 Election of a self-only annuity or partially reduced annuity by married employees and Members [of Civil Service Retirement System].

(a) A married employee may not elect a self-only annuity or a partially reduced annuity to provide a current spouse annuity without the consent of the current spouse or a waiver of spousal consent by OPM in accordance with § 831.618.

(b) Evidence of spousal consent or a request for waiver of spousal consent must be filed on a form prescribed by OPM.

(c) *The form will require that a notary public or other official authorized to administer oaths certify that the current spouse presented identification, gave consent, signed or marked the form, and acknowledged that the consent was given freely in the notary's or official's presence.*

(d) The form described in paragraph (c) of this section may be executed before a notary public, an official authorized by the law of the jurisdiction where executed to administer oaths, or an OPM employee designated for that purpose by the Associate Director.

Conclusions from statutory text:

A civil service employee may only elect to have a CSRS benefit payments in a form other than a joint and survivor annuity if the employee obtains the consent of the participant's spouse on a federally approved form. Thus, prenuptial or postnuptial waivers of spousal rights that satisfy New York law will not be effective for purposes of these CSRS benefits if not completed on a federally approved form. Moreover, as described below, a state law waiver that is not on such a form may not be used to wrest the survivor benefits from a surviving spouse. Finally, as described in the ERISA discussion, such state-law waivers may not be used to compel a participant's spouse to consent to a waiver of her spousal benefits.

2. Federal Life Insurance Spousal Benefit Rights

5 § 8705. Death claims; order of precedence; escheat [FEGLIA Benefits]

(a) Except as provided in subsection (e) [describing deference to domestic relations orders], the amount of group life insurance and group accidental death insurance in force on an employee at the date of his death shall be paid, on the establishment of a valid claim, to the person or persons surviving at the date of his death, in the following order of precedence:

First, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death in the employing office or, if insured because of receipt of annuity or of benefits under subchapter I of chapter 81 of this title [5 U.S.C. §§ 8101 et seq.] as provided by section 8706(b) of this title [5 U.S.C. § 8706(b)], in the Office of Personnel Management. *For this purpose, a designation, change, or cancellation of beneficiary in a will or other document not so executed and filed has no force or effect.*

Second, if there is no designated beneficiary, to the widow or widower of the employee.

Conclusions from statutory text:

A civil service employee may choose any beneficiary he or she wishes except to the extent a domestic relations order described later provides otherwise. However, if the employee fails to make a choice, the default choice is the surviving spouse. In contrast, the default choice for state government group life insurance plans is the employee's estate. *See, e.g.*, N.Y. RETIRE & SOC. SEC. L. § 60 (c) which sets forth who is entitled to the group life benefits for state employees.

3. Federal Retirement and Life Insurance Benefits Do Not Appear to be Included in the New York Elective Share

There is a question whether federal retirement and life insurance benefits are included in a decedent's elective estate. On the one hand, it appears reasonable for the elective share rules to treat them like state government benefits. These rules do not affect the government's benefit payments but merely the ability of the beneficiary to retain the benefits. On the other hand, as with social security, the federal government uses a different spousal benefit paradigm than the elective share paradigm. Default spousal benefits are associated with some benefits, viz., federal pension benefits, but not with other benefits, *viz.* , life insurance benefits. In contrast, there are no default spousal benefits associated with any local government retirement benefits, but all are used in determining the value of the decedent's elective estate, but other items in which the decedent has an interest are excluded from the estate, such as interests in many trusts.

It appears most appropriate to exclude federal retirement and life insurance benefits from the elective estate. The federal statutes governing such benefits appear to preempt the inclusion of such benefits in the elective share. Under N.Y. E. P. T. L. § 5-1.1-A (b)(1)(G) the survivor benefit of retirement plans would be included in the elective estate. Federal pension benefits are not subject to Code § 401(a)(11). Thus, they would be fully included in the decedent's elective estate. This would reduce the surviving spouse's elective share if the default choice, the survivor benefit going entirely to the surviving spouse, were in place. Such treatment would be preempted under the above reasoning of *Free v. Bland*. Full inclusion would increase the surviving spouse's elective share and decrease the entitlement of the beneficiary of the survivor benefit if the participant and the participant's spouse had jointly waived the spousal default benefit in a manner that complied with the federal law, but did not comply with the New York requirements. The beneficiary would generally be responsible for contributing a third of the benefit to the electing surviving spouse. Thus, again the inclusion would be preempted for similar reasons. Including federal life insurance benefits in the elective estate, if *arguendo*, life insurance benefits were included in the elective estate, would lead to the same benefit diminutions.

4. There Appears to be a Lack of Partnership Contractual Rights to Federal Pension Benefits

5 U.S.C. § 8346. [Civil Service Retirement System] Exemption from legal process; recovery of payments

(a) *The money mentioned by this subchapter [5 U.S.C. §§ 8331 et seq.] is not assignable, either in law or equity*, except under the provisions of subsections (h) and (j) of section 8345 of this title [5 U.S.C. § 8345 specified domestic relations orders and allotments approved by the government], or subject to execution, levy, attachment, garnishment, or other legal process, except as otherwise may be provided by Federal laws.

Conclusions from statutory text:

1) Thus, the federal government will not recognize a contract by unmarried partners regarding the allocation of civil service retirement benefits.

> *Cf. Al Haqq v. Office of Personnel Mgmt*, 30 M.S.P.R. 230, 1986 MSPB LEXIS 1142 (Feb 25, 1986) (holding that an individual could not assign survivor benefits to her son because he was not a permissible assignee under the OPM regulations which only allowed assignments to specified employee organizations).

Moreover, contracts by a recipient of those benefits to allocate benefits to a partner do not appear to be enforceable against the recipient's civil service benefit payments or other funds under the reasoning of *Free v. Bland*.

5. Federal Life Insurance Spousal Benefits and Partnership Contractual Rights to Such Benefits

There are special provisions for spousal and children's annuity benefits under the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS), which are available if a participant dies while an employee or a retiree. *See generally* Katelin P. Isaacs, *Survivor Benefits for Families of Civilian Federal Employees and Retirees*, Congressional Research Service No. RS21029 (December 18, 2012) available at http://fas.org/sgp/crs/misc/RS21029.pdf (last visited April 15, 2015). These benefits are not assignable or subject to legal process except pursuant to specified domestic relations orders. 5 U.S.C. § 8346, 5 C.F.R. § 831.1501 (exception for payments to certain organizations) and 5 U.S. C. § 8470. Thus, contracts by unmarried partners with respect to such benefits are not enforceable.

> *See, e.g.*, *Dunne v. Office of Personnel Management*, 173 Fed. Appx. 814 (Fed Cir. 2005) (surviving spouse not entitled to CSRS survivor benefits because she was married for too brief time to the participant even though the marriage followed a long-term co-habiting relation).

There are no special provisions for spousal or children's benefits from the Federal Employees' Group Life Insurance Act of 1954. However, the incidents of ownership of those policies may be assigned. 5 U.S.C. § 8706(f)(1) and 5 C.F.R. § 870.901. Thus, it would appear contracts by unmarried partners regarding the ownership of such policies will be enforceable.

III. ERISA Spousal and Contractual Benefit Rights

The Employee Retirement Income Security Act of 1974, as amended ("ERISA") governs welfare plans and pension plans other than those of governments, churches, or those limited to owner-employees. ERISA was enacted because existing federal and state law did not adequately protect employee benefit plan participants and beneficiaries. Thus, Title I of the Act, the focus of this material is entitled, "Protection of Employee Benefit Rights." ERISA provides the most protection for covered retirement benefits as suggested by words "retirement income" in the title of the statute. In a manner similar to federal retirement benefits, spouses are generally entitled to the entire survivor benefits of most employees' retirement benefits at the time of the employee's death, absent a spousal consent to a waiver by the plan participant. ERISA does not require default spousal designations for ERISA life insurance benefits.

A. ERISA Preemption and Benefit Entitlements

ERISA preempts any state law that "may now or hereafter relate to any [ERISA] employee benefit plan," other than those explicitly or implicitly excluded. ERISA § 514(a). State law "includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." ERISA § 514(c)(1). For example, there are explicit exclusions for certain Medicaid claims against ERISA health care plans, Qualified Domestic Relations Orders, and implicit exclusions for health care regulation. However, there is considerable disagreement about the scope of this preemption.

See generally Albert Feuer, *When Do State Laws Determine ERISA Plan Benefit Rights?*, 47 J. MARSHALL L. REV. 145, 375-91 (Fall 2013) ("*Feuer's Benefit Rights*"), abstract and link to full article available at http://ssrn.com/abstract=2440008 (last visited April 15, 2015) (Discussing preemption of state laws pertaining to ERISA benefit rights with respect to state family and domestic relations laws).

ERISA § 502. Civil enforcement [for all ERISA Plans]

(a) Persons empowered to bring a civil action. *A civil action may be brought*--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsections (c) of this section [documents], or

(B) *to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . .*

Conclusions from statutory text:

1) The statute is applicable not only to all ERISA pension plans, but to all ERISA plans.

2) This section gives participants and beneficiaries of an ERISA plan the right to enforce their benefit rights, if any, under the terms of the plan. Participants and beneficiaries have the same ERISA enforcement rights.

B. ERISA Spousal Benefit Rights

ERISA § 205. Requirement of joint and survivor annuity and preretirement survivor annuity [for Spousal Survivor Benefit Plans]

(a) Required contents for applicable plans. *Each pension plan to which this section applies shall provide that*--

(1) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a *qualified joint and survivor annuity*, and

(2) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, *a qualified preretirement survivor annuity* shall be provided to the surviving spouse of such participant.

(c) (2) *Each plan shall provide that an election under paragraph (1)(A)(I) [to waive the requisite annuity] shall not take effect unless*--

(A) (i) *the spouse of the participant consents in writing to such election*, (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) *the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public*,

Conclusions from statutory text:

1) The spousal survivor protections are similar to those for federal retirement plans. The default benefits are spousal benefits while the participant is receiving his plan benefits and survivor benefits to surviving spouses. Thus, ERISA plans subject to these rules are often called Spousal Survivor Benefit Plans.

2) There are explicit standards for the selection of a benefit form other than the default

spousal survivor benefit, which include disclosure to the spouse of the effects of such an election. *See, e.g.*, Treas. Reg. § 1.417(a)(3)-1.

3) These spousal protection provisions do not apply to Top-Hat Plans (maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees), SEPs and SIMPLE Plans (covering almost all employees and funded with IRAs) or life insurance plans.

4) For Spousal Survivor Benefit Plans the regulations require a participant to obtain the consent of a spouse to participant plan loans. Treas. Reg. § 1.401(a)-20 Q & A-24.

Treas. Reg. § 1.401(a)-20 [Spousal Survivor Benefit Waiver and Consents]

Q & A-28: Does consent contained in an antenuptial agreement or a similar contract entered into prior to marriage satisfy the consent requirements of sections 401(a)(11) and 417 [identical to ERISA § 205]?

A-28: *No. An agreement entered into prior to marriage does not satisfy the applicable consent requirements, even if the agreement is executed within the applicable election period.*

Conclusions from Regulatory text:

A spouse may not be compelled by a state court order to comply with prenuptial agreements to consent to the waiver by a participant of the spouse's benefits under a Spousal Survivor Benefit Plan.

> *Cf. Hurwitz v. Sher*, 982 F.2d 778, 781 (2d Cir. 1992) (holding that a spouse may not be ordered to comply with a prenuptial agreement and waive pension interest after death of participant, although the plan appeared to have no employee participants and thus was not an ERISA plan) and *Callahan v. Hutsell, Callahan & Buchino P.S.C Revised Profit Sharing Plan*, 1993 U.S. App. LEXIS 34005 (6th Cir. 1993) (remanding to determine if surviving spouse breached a prenuptial agreement to execute a plan consent to a new beneficiary designation). *Hurwitz* seems more consistent with the later Supreme Court pronouncement that "It does not matter that respondents have sought to enforce their rights only after the retirement benefits have been distributed. since their asserted rights are based on the theory that they had an interest in the undistributed pension plan benefits. Their state-law claims are pre-empted." *Boggs*, 520 U. S. 833 at 854 (1997).

C. ERISA Benefits Do Not Appear to be Included in the New York State Elective Share

There is a question whether ERISA benefits are included in a decedent's elective estate. On the one hand, it appears reasonable for the elective share rules treat them like state government benefits. The rules do not affect the government's benefit payments but merely the ability of the beneficiary to retain the benefits. On the other hand, as with social security ERISA uses a different spousal benefit paradigm than the elective share paradigm and the local government benefit policies. Spousal benefits are associated with some but not all ERISA benefits, rather than with the value of all the decedent's property.

It appears most appropriate to exclude all ERISA benefits from the elective estate. ERISA appears to preempt the inclusion of such benefits in the elective share.

> *Boggs v. Boggs*, 520 U.S. 833 (1997) (ERISA prevents state community property law from being used to wrest benefit from the designated beneficiary) and *Free v. Bland*, 369 U.S. 663 (1962) (State community property law may not be used to wrest benefit from a joint owner of a U. S. Savings bond).

Community property, like the New York State elective share law, provides spouses with death benefits, although by determining the property interest of each spouse on a property by property basis at any time during the marriage rather than by taking a fraction of the value of the other spouse's marital property at the time of the spouse's death. Thus, if community property claims are preempted, then a fortiori elective share claims are preempted In particular, elective share rules may not be used to compel persons entitled to ERISA benefits under the terms of an ERISA plan to give up any portion of those benefits. This would apply to benefits from (1) Spousal Survivor Benefit Plans, in which spouses are entitled to at least 50% of the survivor benefit; (2) SEP and SIMPLE plans which cover most employees and are funded with IRAs but are not required to provide any spousal survivor benefits; (3) Top-Hat Plans which cover primarily executives but are not required to provide any spousal survivor benefits; and (4) life insurance plans which are not required to provide any spousal survivor benefits. Moreover, the same reasoning that results in the exclusion of federal pension plan benefits from the decedent's elective estate is applicable to ERISA plan benefits.

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D. There Appears to be a Lack of Partnership Contractual Rights to Benefits from ERISA Spousal Benefit Plans

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ERISA § 206(d). Assignment or alienation of [Spousal Survivor Benefit] plan benefits

(1) Each pension plan shall provide that *benefits provided under the plan may not be assigned or alienated*.

Conclusions from statutory text:

ERISA plans will not recognize a contract by unmarried partners re allocation of ERISA Spousal Survivor Benefit Plan benefits. Moreover, it would appear that a contract by a recipient of those benefits to allocate ERISA plan benefits to a partner may not be enforced against the recipient's ERISA benefit payments or other funds. *But see* discussion of *Kennedy* below.

E. Lack of Spousal Benefit Mandate for ERISA Plans other than Spousal Survivor Benefit Plans and Partnership Contractual Rights to Such Benefits

ERISA does not require that ERISA Plans other than Spousal Survivor Benefit Plans, such as Top-Hat Plans or Life Insurance Plans, provide any spousal benefits. However, such plans may provide spousal benefits similar to those provided by Spousal Survivor Benefit Plans. Those plans may also provide that the plan benefits are assignable. Contracts by unmarried partners regarding entitlements to benefits from such plans will be enforceable against the plan only to the extent they are consistent with the plan terms because such plans as described below may also distribute plan benefits pursuant to such terms. It is unclear as described below whether the contracts may be enforced against the participant.

F. ERISA Deference to Enforcement of State Law Support Obligations

There is considerable uncertainty about the extent of ERISA deference to state-law orders attempting to enforce state law support obligations. As discussed below, ERISA plans subject to the QDRO Rules must defer to enforcement mechanisms that comply with the conditions for a

Qualified Domestic Relations Order ("QDRO") or are issued pursuant to such an order, but may not defer to other mechanisms. *See, e.g.*, https://www.nycourts.gov/forms/familycourt/pdfs/4-23.pdf (last visited April 15, 2015) and http://www.pbgc.gov/documents/qdro.pdf#page=34 (last visited April 15, 2015) (presenting sample QDROs to obtain child support) However, as discussed below, there is considerable question about the extent to which other plans must comply with support orders, and the extent to which ERISA participants or beneficiaries may be subject to a support order with respect to distributed ERISA plan benefits.

IV. General New York Domestic Relations Provisions

New York domestic relations law now permits a no-fault divorce to be obtained without the need for a prior separation agreement. This was not the case before 2010. Courts resolve contested matrimonial actions by making an equitable distribution of marital assets between the parties, which must take into account the support needs of the parties and their dependents. This was not the case before 1980. Contested matrimonial actions begin with automatic restraining orders to prevent either party from making specified changes in their assets including changes to each party's retirement, life insurance and annuity benefits. New York also provides that unless the parties or beneficiary designation procedures provide otherwise any designations of the spouse of the creator of a benefit is terminated by the divorce.

A. Grounds for Divorce

N.Y. Dom Rel L. § 170. Action for divorce

An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

> (5) *The husband and wife have lived apart pursuant to a decree or judgment of separation [legal separation]* for a period of one or more years after the granting of such decree or judgment, and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment.
>
> (6) *The husband and wife have lived separate and apart pursuant to a written agreement of separation [informal separation]*, subscribed by the parties thereto and

acknowledged or proved in the form required to entitle a deed to be recorded, for a period of one or more years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement. Such agreement shall be filed in the office of the clerk of the county wherein either party resides. In lieu of filing such agreement, either party to such agreement may file a memorandum of such agreement, which memorandum shall be similarly subscribed and acknowledged or proved as was the agreement of separation and shall contain the following information: (a) the names and addresses of each of the parties, (b) the date of marriage of the parties, (c) the date of the agreement of separation and (d) the date of this subscription and acknowledgment or proof of such agreement of separation.

(7) [Added, L 2010] *The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath* [no-fault divorce]. No judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce.

Conclusions from statutory text:

1) Prior to October 2010 no-fault divorces had to be preceded by the parties living apart pursuant to a separation agreement for at least a year. In most cases, the parties used informal agreements that were not filed with the court. During that period there was often a concern that one party could change the status quo before the divorce was put in place or one party may have wished to do something to change the status quo. Thus, the separation agreement often contained provisions to maintain the status quo or to change the status quo as desired by one of the parties. For example, it was common to include a waiver of the exercise of the right of election.

2) After October 2010 no-fault divorces became more readily available in New York. The parties could present the court with an agreement resolving all the relevant issues that may be incorporated into the judgment of divorce. Thus, there was no longer a need for the parties to set forth which changes to permit and which to curb during an interim period while a separation agreement was in effect.

B. Absent Agreement Between Parties a Marital Action Begins with Restraining Order

N.Y. Dom. Rel. L. § 236 Part B New Actions or Proceedings

Matrimonial actions. 2.b With respect to matrimonial actions which commence on or after the effective date of this paragraph, the plaintiff shall cause to be served upon the defendant, simultaneous with the service of the summons, a copy of the automatic orders set forth in this paragraph. The automatic orders shall be binding upon the plaintiff in a matrimonial action immediately upon the filing of the summons, or summons and complaint, and upon the defendant immediately upon the service of the automatic orders with the summons. The automatic orders shall remain in full force and effect during the pendency of the action, unless terminated, modified or amended by further order of the court upon motion of either of the parties or upon written agreement between the parties duly executed and acknowledged. The automatic orders are as follows:

(1) Neither party shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property (including, but not limited to, real estate, personal property, *cash accounts, stocks, mutual funds, bank accounts*, cars and boats) individually or jointly held by the parties, . . . *except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this action*.

(2) *Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keogh accounts, or any other pension or retirement account*, and the parties shall further refrain from applying for or requesting the payment of retirement benefits or annuity payments of any kind, without the consent of the other party in writing, or upon further order of the court; except that any party who is already in pay status may continue to receive such payments thereunder.

(5) *Neither party shall change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance*, automobile insurance, homeowners and renters insurance policies in full force and effect.

Conclusions from statutory text:

1) A restraining order is designed to preserve the status quo until there is a final divorce decree, which was more of a concern when divorces were often preceded by separation agreements being in effect for at least a year.

2) A restraining order is directed at the parties whose funds are in the kinds of listed

accounts rather than the person maintaining the accounts and does not seem enforceable against those persons, although as discussed below similar provisions in divorce decrees may be enforced against a state government plan.

> *See, e.g.*, *Divorce and Your Benefits, Frequently Asked Questions-Getting Started*, New York State & Local Retirement System, Office of the New York State Comptroller Q &A 4 available at http://www.osc.state.ny.us/retire/members/divorce/faq/getting_started.php (last visited April 15, 2015) (declaring that automatic restraining orders do not restrict the actions of the New York State & Local Retirement System).

3) A restraining order appears to be enforceable against a party with respect to the party's interest in state government plan benefits. However, a restraining order is generally not enforceable against the estate of an individual who breaches the order, but passes away prior to the grant of the divorce.

> *See, e.g.*, *In re Alfieri*, 203 A.D.2d 562 (2d Dep't 1994) (holding death abated pending matrimonial action and thus deprived surviving spouse of right to compel IRA designee chosen in violation of a *pendente lite* order during the course of the action, but surviving spouse retained right to elective share).

4) Absent an agreement between the parties the statute limits rather than prevents each party's use of funds from a bank or mutual fund accounts without court approval.

5) Absent an agreement between the parties, the statute only permits one use of funds from one of the party's retirement accounts without court approval, namely the continuation of the payment of plan benefits whose payments began prior to the action.

6) Absent an agreement between the parties the statute requires the parties to maintain existing life insurance policies and not change beneficiaries. Presumably this applies to both individual and group policies, such as employment-related policies. There is no similar beneficiary limitation for retirement plans.

C. Absent Agreement Between Parties the New York Courts Will Distribute Marital Property Equitably

NY CLS Dom Rel § 236 Part B NEW ACTIONS OR PROCEEDINGS

Matrimonial actions.

b.3: 1

An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. Notwithstanding any other provision of law, an acknowledgment of an agreement made before marriage may be executed before any person authorized to solemnize a marriage pursuant to subdivisions one, two and three of section eleven of this chapter. Such an agreement may include (1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; (2) provision for the ownership, division or distribution of separate and marital property; (3) provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment . . .

b.5: Disposition of property in certain matrimonial actions.

a. *Except where the parties have provided in an agreement for the disposition of their property pursuant to subdivision three of this part*, the court, in an action wherein all or part of the relief granted is divorce, or the dissolution, annulment or declaration of the nullity of a marriage, and in proceedings to obtain a distribution of marital property following a foreign judgment of divorce, shall determine the respective rights of the parties in their separate or marital property, and shall provide for the disposition thereof in the final judgment.

b. Separate property shall remain such.

c. Marital property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties.

d. In determining an equitable disposition of property under paragraph c, the court shall consider:

(1) the income and property of each party at the time of marriage, and at the time of the commencement of the action; . . .

(4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution; . . .

(6) any award of maintenance under subdivision six of this part;

b.8. Special relief in matrimonial actions.

a. . .. *The court may also order a party to purchase, maintain or assign a policy of accident insurance or insurance on the life of either spouse, and to designate in the case of life*

insurance, either spouse or children of the marriage, or in the case of accident insurance, the insured spouse as irrevocable beneficiaries during a period of time fixed by the court. The obligation to provide such insurance shall cease upon the termination of the spouse's duty to provide maintenance, child support or a distributive award . . .

Conclusions from statutory text:

1) Prenuptial and post-nuptial agreements may be enforceable in a matrimonial action. Moreover, such an agreement may include a contract to make a testamentary provision or a waiver of any right to elect against the provisions of a will.

2) The equitable distribution of property between the parties must take into account both the different marital property interests of the parties and the maintenance needs, if any, of the parties.

3) Divorce decrees trump assignment restrictions of local government plans even if the pension benefits are not used exclusively for the support of the former spouse and the participant's dependents.

> *Cf. Zwingmann v. Zwingmann*, 150 A.D. 358, at 360 (2d. Dep't. 1912) (declaring "We do not believe the Legislature, in creating the police pension fund and exempting it from execution and other processes, ever intended that this exemption should be construed to deprive the wife of her legal and moral right to the support of her husband") and *Kaplan v. Kaplan*, 82 N.Y.2d 300 (N.Y. 1993) (declaring "Under the Equitable Distribution Law a distribution of property upon dissolution of the marriage now commonly stands in the place of ongoing support payments formerly provided for by a court-ordered alimony award" and holding that an agreement by a participant that was incorporated into a divorce decree to designate a beneficiary of New York Teachers Retirement System benefits is enforceable against the System).

4) There is no domestic relations provision authorizing a divorce decree to require a benefit from a government plan that is not otherwise provided by the plan other than perhaps treating a former spouse as the participant's current spouse. For example the decree may not give the former spouse the right to receive a pension benefit before the time when the participant begins to receive the plan benefit. *See, e.g.*, *Divorce and Your Benefits, Frequently Asked Questions*, *Payments to Alternate Payee*, New York State & Local Retirement System, Office of the New York State Comptroller Q & A 4 available at http://www.osc.state.ny.us/retire/members/divorce/faq/getting_started.php (last visited April 15, 2015).

5) The pension benefits earned by the two parties during the marriage are generally marital properties which are therefore subject to an equitable distribution between the parties.

See Majauskas v. Majuskas, 61 N.Y.2d 481 (N.Y. 1984) (described the determination of the portion of defined benefit pension plan benefits earned subject to equitable distribution when payable, and holding that this provision preempts the assignment prohibition on Rochester police pensions).

6) The divorce decree may direct a party to purchase, maintain or assign a life insurance policy and to designate either spouse or their children as be the plan beneficiary for a time fixed by the court.

But see Estate of Walter L. Tanenblatt, 160 Misc. 2d 490 (Sur. Ct., Nassau Co. 1994) (holding that no windfall goes to a former spouse from life insurance maintained to secure separation agreement payment and the excess proceeds go to the decedent's estate)

7) While divorce decrees determine the parties' interest in pension or life insurance benefits the decrees often determine beneficiary interests by directing the party who is the participant to designate a specified person as the beneficiary as in the above decisions.

D. Absent Contrary Terms in Plan or Divorce Decree, a Divorce Revokes any Participant designation of his former Spouse

N. Y. E. P. T. L § 5-1.4 Revocatory effect of divorce, annulment or declaration of nullity, or dissolution of marriage on disposition, appointment or other provision in will to former spouse

(a) *Except as provided by the express terms of a governing instrument, a divorce (including a judicial separation as defined in subparagraph (f)(2)) or annulment of a marriage revokes any revocable*

(1) disposition or appointment of property made by a divorced individual to, or for the benefit of, the former spouse, including, but not limited to, *a disposition or appointment by will, by security registration in beneficiary form (TOD), by beneficiary designation in a life insurance policy or (to the extent permitted by law) in a pension or retirement benefits plan, or by revocable trust, including a bank account in trust form*,

(2) provision conferring a power or power of disposition on the former spouse, and

(3) nomination of the former spouse to serve in any fiduciary or representative capacity, including as a personal representative, executor, trustee, conservator, guardian,

agent, or attorney-in-fact.

(b)(1) *Provisions of a governing instrument are given effect as if the former spouse had predeceased the divorced individual as of the time of the revocation*.

(2) A disposition, appointment, provision, or nomination revoked solely by this section shall be revived by the divorced individual's remarriage to the former spouse. . . .

(d)(1) *A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary (including a former spouse) designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in good faith reliance on the validity of the governing instrument, before the payor or other third party received written notice of the divorce, annulment, or remarriage*.

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Conclusions from statutory text:

1) Under the revocation upon divorce provision, the entitlement to the decedent's survivor benefit (for retirement benefits) and death benefit (for life insurance benefits) passes to the beneficiary who would obtain the benefit if the former spouse predeceased the decedent. This person may not be the decedent's estate.

2) The revocation upon divorce provision is only applicable to revocable designations. It is not applicable to irrevocable designations, such as often occurs when benefit payments have already begun under an annuity form of payment.

3) The revocation is effective whether the administrator of the retirement, annuity or life insurance plan is aware of the divorce, annulment or legal separation. However, the administrator is not responsible for implementing the revocation until it receives notice of the marital dissolution. This payor ignorance is often the result of a divorcing party being unaware of the provision and thus fails to see any need to give the notice or to review the designation.

4) If a plan does not override the revocation upon divorce provision and the participant wishes to have his or her former spouse continue to be the beneficiary, the participant must execute a new designation renaming the former spouse following the divorce.

5) Many New York State retirement and life insurance plans do not choose to override the revocation upon divorce statute.

See, e.g., *Divorce and Your Benefits, Death and Survivor Benefits*, New York State & Local Retirement System, Office of the New York State Comptroller available at http://www.osc.state.ny.us/retire/members/divorce/faq/death_survivorship.php (last

visited April 15, 2015) (declaring at Q&A 6 that "the designation of your spouse as beneficiary of certain benefits is revoked if you get a divorce, annulment or judicial separation and we receive") and Tier 4 -62/5 Summary Plan Description (SPD) at 58 (April 2012) available at http://www.nycers.org/(S(sm5pnzrdmambdz55hiattf45))/pdf/spd/updates/625.pdf (last visited April 15, 2015) (Describing the statutory revocation upon divorce provision) and DRO Frequently Asked Questions, New York City Police Pension Fund (Q & A 8 describing statutory revocation upon divorce provision).

V. Federal Non-ERISA Domestic Relations Provisions

The laws governing federal retirement, life insurance, and annuity benefits provide for full deference to support orders, but limit the deference to other domestic relations orders. Many of the laws provide for benefits for divorced spouses.

A. Federal Social Security Divorce Benefit Rights

Child support and alimony obligations may be enforced against an individual's social security benefits. 42 U. S. C. § 659. There is no provision for the enforcement of any other obligations that may arise from a marital dissolution. Thus, the general anti-assignment rules would preempt the domestic relations order. 42 U.S.C. § 407(a)

A divorced spouse qualifies for the same spousal lifetime and survivor benefit as a worker's spouse if the divorced spouse (1) was married to the worker for at least 10 years; (2) must be at least age 62; (3) divorced for at least two years; (4) and has not remarried. 42 U. S. C § 402(b). As with an actual spouse, the divorced spouse qualifies for a spousal benefit, only if the spouse's personal retirement or disability benefit is less than the other spouse's benefit. *Id.* There are also provisions for survivor benefits for a worker's surviving minor children, who were dependent upon the worker at the time of his death. 42 U.S.C. § 402(d). Moreover, spousal benefits may be payable to more than one divorced spouse, or to the spouse and to one or more divorced spouses without affecting the worker's social security benefits.

B. Federal Pension Divorce Benefit Rights

5 U. S. C. § 8345. Payment of [Civil Service Retirement System] benefits; commencement, termination, and waiver of annuity

(j) (1) *Payments* under this subchapter [5 U.S.C. §§ 8331 et seq.] which would otherwise be made to an employee, Member, or annuitant based on service of that individual *shall be paid (in whole or in part) by the Office [of Personnel Management] to another person* if and to the extent *expressly provided* for in the terms of--

(A) *any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation*;

(2) Paragraph (1) shall only apply to payments made by the Office under this subchapter [5 U.S.C.. §§ 8331 et seq.] after the date of receipt in the Office of written notice of such decree, order, other legal process, or agreement, and such additional information and documentation as the Office may prescribe.

Conclusions from statutory text:

1) As with FEGLIA, the plan administrator is not required to make any payments to a third party until the appropriate federal office receives an acceptable instrument directing such payments. It would appear that because the anti-assignment provision, 5 U. S. C. § 8346(a), remains applicable if the instrument does not contain the requisite explicit language such as that set forth for CSRS benefits in 5 C. F. R. § 838.1004, the participant's former spouse may not use the instrument to compel the participant to pay any portion of the plan benefit. The result would be the same for any payments prior to the submission to the OPM of the instrument containing such language. The regulations describing the notice and substantive requirements of a court orders that qualify under this provision, 5 C. F. R. § 838.1004, do not address the participant's liability. These orders are often called Court Orders Acceptable for Processing ("COAPs"). *See generally* 5 C. F. R. §§ 838.101-138 and Court-Ordered Benefits for Former Spouses-Office of Personnel Management (Rev-July 2014) (describing orders that may affect CSRS benefits, FERS benefits, and FEGLIA benefits) available at http://www.opm.gov/retirement-services/publications-forms/pamphlets/ri84-1.pdf (last visited April 15, 2015).

But see McDannell v U.S. Office of Personnel Mgmt. 716 F.2d 1063 (5th Cir. 1983) (holding that the OPM was not required to make CSRS payments to a participant's former wife when participant breached his divorce decree obligation to pay

her a portion of his benefit payments, but the court appeared to presume that the former wife could compel participant to make payments to her) and *Donlan v. U.S. Office of Personnel Mgmt*., 907 F.2d 1132 (Fed. Cir. 1990) (holding that OPM was required to make benefit payments directly to the former wife when the instrument was vague on whether OPM was to pay her)

2) As with the New York State government plans a DRO may not change the terms of the federal pension plans, such as obtaining a benefit payment before the participant begins to receive payments. However, there are federal law provisions for treating a former spouse as a surviving spouse under the family survivor benefit pre-retirement provisions. 5 U.S.C. § 8341(h)(1) (CSRS employees) and 5 U.S.C. § 8445 (FERS employees).

There are similar provisions providing that DROs, other than those for support discussed previously, may be enforced under similar circumstances against other federal pensions, such as from the federal employee retirement system 5 U.S.C. § 8467. *See generally* 5 C. F. R.§§ 838.101-933 (procedures governing domestic relations orders applicable to the FERS benefits which requiring very specific references to the federal statutes).

3) As with New York State government pension plans and all pension plans, the automatic restraining order does not bind the federal retirement plans.

5 U. S. C. § 8341. [Civil Service Retirement System] Survivor annuities

(h) (1) Subject to paragraphs (2) through (5) of this subdivision, a former spouse of a deceased employee, Member, annuitant, or former Member who was separated from the service with title to a deferred annuity under section 8338(b) of this title [5 U.S.C. § 8338(b)] is entitled to a survivor annuity under this subdivision, *if and to the extent expressly provided for* in an election under section 8339(j)(3) of this title [5 U.S.C. § 8339(j)(3)], or *in terms of any decree of divorce or annulment or any court order or court-approved property settlement agreement incident to such degree*.

Conclusions from statutory text:

1) As with the payments during a federal employee's life, survivor benefit entitlements require the submission to the appropriate federal office of an acceptable instrument, which may require the former spouse to make an election with respect to the annuity. *See generally* 5 C. F. R. §§ 838.701-933 (setting forth requisite language and procedures for acceptable COAPs and elections that may be associated with such a COAP). Unlike FEGLIA life insurance benefits, CSRS survivor benefit submission may be made after the death of the federal employee 5 C. F. R. §§ 838.722(b).

2) It would appear that because the anti-assignment provision, 5 U. S. C. § 8346(a), remains applicable if the instrument does not contain the requisite explicit language such as that set forth for CSRS benefits in 5 C. F. R. § 838.1004, the participant's former spouse may not use the instrument to compel the participant to pay any portion of the plan benefit.

C. Federal Life Insurance Divorce Benefit Rights

5 U.S.C. § 8705. [FEGLIA] Death claims; order of precedence; escheat

(e) (1) Any amount which would otherwise be paid to a person determined under the order of precedence named by subsection (a) shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, *or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation*.

(2) For purposes of this subsection, a decree, order, or agreement referred to in paragraph (1) shall not be effective unless it is received, before the date of the covered employee's death, by the employing agency or, if the employee has separated from service, by the Office.

Conclusions from statutory text:

1) The statute specifically permits a DRO to determine who is entitled to receive FEGLIA life insurance proceeds. *See generally* 5 C.F.R. § 870.801. This provision does not refer to the optional life insurance available to a participant's spouse and children which are only available to married participants. 5 U.S.C. § 8714c.

2) The order is required to explicitly name the new beneficiary and the beneficiary's interest.

3) A domestic relation order compliant with the federal rules is effective only if it is received by the appropriate federal office before the employee's death. 5 C.F.R. § 870.802. An order that is not received by the appropriate office may not be used to obtain the benefits from the former spouse after they are distributed to such individual. *See Hillman*

4) There is also an FEGLIA section permitting a DRO to direct a participant to transfer all incidents of ownership of policy to the person specified in order. 5 U.S.C. § 8706(f)(2).

5 U.S.C. § 8706. Termination of [FEGLIA] insurance; assignment of ownership

(f) (1) Under regulations prescribed by the Office, each policy purchased under this chapter [5 U.S.C. §§ 8701 et seq.] shall provide that an insured employee or former employee may make an irrevocable assignment of the employee's or former employee's incidents of ownership in the policy.

(2) *A court decree of divorce, annulment, or legal separation, or the terms of a court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation, may direct that an insured employee or former employee make an irrevocable assignment of the employee's or former employee's incidents of ownership in insurance* under this chapter (if there is no previous assignment) to the person specified in the court order or court-approved property settlement agreement.

Conclusions from statutory text:

1) The statute specifically permits a DRO to compel an employee, rather than the federal government, to assign the incidents of ownership of the FEGLIA policy.

2) The assignment must be implemented on an approved form in accord with the procedures set forth in federal regulations and filed with the appropriate federal office prior to the participant's death *See generally* 5 C.F.R. §§ 870.901, and 902.

3) The regulations do not permit the assignment of life insurance coverage for a participant's spouse or children. 5 C.F.R. § 870.901.

5 U.S.C. § 8709. [FEGLIA] Insurance policies

(d) (1) The provisions of any contract under this chapter [5 U.S.C. §§ 8701 *et seq*.] which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) *shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions*.

Conclusions from statutory text:

1) Although the statute is limited to conflict preemption, the Supreme Court left little

doubt that no state law claim arising from a DRO, not merely a DRO that does not meet the above criteria, may change FEGLIA benefit entitlements.

> *Hillman v Maretta*, 569 U.S. ___, 133 S. Ct. 1943, 2013 U.S. LEXIS 4167 (June 3, 2013) (FEGLIA preempts the use of state revocation upon divorce laws to wrest benefit distributions from beneficiaries). The Court's description of why the Court granted certiorari shows that (1) FEGLIA preempts the state laws arising from a DRO that were used to wrest benefits from FEGLIA beneficiaries, such as those cited in that discussion; and (2) FEGLIA preempts state laws that seek to compel FEGLIA employee parties to make benefit designations rather than to assign the incidents of ownership to FEGLIA policies, such as those cited in that discussion. *See generally* Albert Feuer, *The Supreme Court Finds Federal Life Insurance Rules Preempt State Law in Hillman v. Maretta and Reinforces ERISA Protections for ERISA Plan Participants and Beneficiaries*, 32 TAX MGM'T WKLY. J. 1040 (August 5, 2013) abstract and link to full article available at http://ssrn.com/abstract=2306911 (last visited April 15, 2015).

2) It thus appears that FEGLIA preempts a New York automatic restraining order issued at the start of contested matrimonial actions restraining participants from changing FEGLIA beneficiary designations. This is because such order affects FEGLIA benefit entitlements but is not one of the acceptable domestic relations orders set forth in FEGLIA. Under similar reason FEGLIA would preempt a state court order directing a participant to make an FEGLIA beneficiary designation but not an order directing the plan to make a benefit payment to a specified person or an order directing the employee to assign the benefit.

VI. ERISA Domestic Relations Provisions

The Supreme Court required an ERISA plan to show extreme deference to a state domestic relations law in its first ERISA preemption decision in 1980. In particular, the Court held that (1) a domestic relations order was effective even though the ERISA plan prohibited any payments pursuant to a state domestic relations order; and (2) an ERISA plan may be joined to a domestic relations proceeding that was considering the parties' rights to ERISA plan benefits. *In re Campa*, 152 Cal. Rptr., at 362; *Carpenters Pension Trust Fund for N. Cal.*, 444 U.S. at 1028 (1980). After the 1984 enactment of the Retirement Equity Act of 1984, which reversed that decision in substantial part, the Court has been ambiguous with respect to the degree of deference that ERISA plans, participants and beneficiaries must show toward state family and domestic relations law. This is a result of the Court taking two distinct approaches with respect to the preemption of family and domestic relations law by focusing on two distinct ERISA provisions.

One approach focuses on the ERISA dominating general purpose of protecting ERISA plan participants and beneficiaries, and shows little deference. The second approach focuses on protecting the administration of ERISA plans, and suggests that considerable deference is due. This has resulted in considerable confusion about which domestic relations orders ERISA plans must follow, the extent to which domestic relations orders may be used to wrest benefits from those who were entitled to receive those benefits from an ERISA plan, and the information parties to a domestic relations proceeding may obtain from an ERISA plan.

A. ERISA General Provisions and The Confusion About Their Application to State Family and Domestic Relations Law

ERISA § 502. Civil enforcement [for all ERISA Plans]

(a) Persons empowered to bring a civil action. A civil action may be brought--

(1) by *a participant or beneficiary*--

(A) for the relief provided for in subsection (c) of this section, or

(B) *to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . .*

Conclusions from statutory text:

This section gives participants and beneficiaries of any ERISA plan the right to enforce their benefit rights under the terms of the plan. The plan terms must conform to ERISA. Otherwise, they could not be enforced. In contrast, the plan documents, if any, need not conform to ERISA, although they are often the starting point for determining the plan terms,

The Court focused on this section in *Boggs v. Boggs*, 520 U.S. 833 (1997) (holding ERISA prevents state community property law from being used to wrest distributed pension plan benefits from the designated beneficiary of an ERISA plan) and declared at 854:

> *The axis around which ERISA's protections revolve is the concepts of participant and beneficiary.* When Congress has chosen to depart from this framework, it has done so in a careful and limited manner. Respondents' claims, if allowed to succeed, would depart from this framework, upsetting the deliberate balance central to ERISA. *It does not matter that respondents have sought to enforce their rights only after the retirement benefits have been distributed since their asserted rights are based*

on the theory that they had an interest in the undistributed pension plan benefits. Their state-law claims are pre-empted.

The Court also focused on the ability of a person to enforce federal benefit rights more than thirty years earlier in *Free v. Bland*, 369 U.S. 663 (1962) (holding state community property law may not be used to wrest benefit from joint owner of a U. S. Savings bond) and more than fifteen years at a later time in *Hillman v Maretta*, 569 U.S. ___, 133 S. Ct. 1943, 2013 U.S. LEXIS 4167 (June 3, 2013) (holding FEGLIA preempts the use of state revocation upon divorce laws to wrest benefit distributions from beneficiaries).

ERISA § 404. Fiduciary duties [for most ERISA Plans other than Top-Hat Plans]

(a) Prudent man standard of care.

(1) Subject to sections 403(c) and (d), 4042, and 4044 [29 U.S. C. §§ 1103(c), (d), 1342, 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and– . . .

(D) *in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV*.

Conclusions from the statutory text and other statutes:

1) ERISA provides no mechanism by which a person may use this fiduciary responsibility section to enforce such person's ERISA benefit rights. Moreover, benefit rights are determined by the terms of the plan rather than the terms of the plan documents which may not be consistent with ERISA.

2) This fiduciary responsibility section is not applicable to all ERISA plans. It is inapplicable to Top-Hat plans. Thus, the applicability of decisions based on this section to Top-Hat Plans is unclear even though the plan documents of such plans set forth the plan terms.

The Court focused on this section in *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) (holding ERISA prevents state revocation upon divorce statutes from being used to wrest retirement and life insurance benefits from a designated beneficiary, who was the participant's former spouse) and declared at 147:

> The administrators must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents. The statute thus implicates an area of core ERISA concern. In particular, it runs counter to ERISA's commands that a plan shall "specify the basis on which payments are made to and from the plan," § 1102(b)(4), and that *the fiduciary shall administer the plan "in accordance with the documents and instruments governing the plan," § 1104(a)(1)(D), making payments to a "beneficiary" who is "designated by a participant, or by the terms of [the] plan."* § 1002(8).

However, this does not explain the Court holding that the state law may not be used to wrest the benefits from the beneficiary after the plan has paid that person. The Court explained that holding by emphasizing that the primary ERISA goal was not to minimize administrative burdens on plans but to protect participant benefit rights by declaring at 150 n.3:

> The dissent observes that the Washington statute [that the Court held was preempted] permits a plan administrator to avoid resolving the dispute [about who is entitled to the plan benefits] himself and to let courts or parties settle the matter. See post, at 6. *This observation only presents an example of how the costs of delay and uncertainty can be passed on to beneficiaries, thereby thwarting ERISA's objective of efficient plan administration*.

This approach focusing on the fiduciary responsibilities of ERISA plan administrators was also taken in *Kennedy v. Plan Adm'r of the Du Pont Sav. and Inv. Plan*, 555 U.S. 285 (2009) (holding ERISA prevents a common-law contract or a state-law claim that is not consistent with plan document terms from being used to obtain benefit payments from the plan). However, the Court raised much confusion with its footnote 10 in which the Court explicitly expressed no opinion on whether *Boggs* prevents a divorce decree or a separation agreement from being used to wrest distributed benefits from a designated beneficiary. The unanimous decision also created further confusion by failing to mention its earlier decision, *Mackey v. Lanier Collection Agency & Serv., Inc*., 486 U.S. 825 (1988), in which a five justice majority held that ERISA permits the state law garnishment of benefit payments from an ERISA plan other than a Spousal Survivor Benefit Plan without any consideration of ERISA § 404(a)(1)(D) or 502(a)(1)(D). However, the *Egelhoff* dissenting opinion explicitly relied on *Mackey*. On the other hand, the Supreme Court seemed to resolve the confusion it created with footnote 10 by returning to the *Boggs* approach in *Hillman* without mentioning *Boggs* by focusing on the importance of maintaining the FEGLIA benefit rights of the individual designated by the plan participant.

B. ERISA Explicit Domestic Relations Provisions

ERISA § 206(d). Assignment or alienation of [Spousal Survivor Benefit] plan benefits.

(1) Each pension plan shall provide that *benefits provided under the plan may not be assigned or alienated*.

(3)

(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. *Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order* [a "QDRO"]. . .

(C) *A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies*--

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined.

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies. . . .

(E) (i) A domestic relations order shall not be treated as failing to meet the requirements of clause (i) of subparagraph (D) [only permitting an order to require a benefit provided under the plan terms] solely because *such order requires that payment of benefits be made to an alternate payee*--

(I) in the case of any payment before a participant has separated from service, on or after the date on which the participant attains (or would have attained) the earliest retirement age,

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(II) *as if the participant had retired on the date on which such payment is to begin under such order* (but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(III) *in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse)*.

(J) A person who is an alternate payee under a qualified domestic relations order *shall be considered for purposes of any provision of this Act a beneficiary under the plan*. Nothing in the preceding sentence shall permit a requirement under section 4001 [29 U.S.C. § 1301] of the payment of more than 1 premium with respect to a participant for any period.

Conclusions from statutory text:

1) There are two basic QDRO rules. First, plans to which the rules apply must disregard a domestic relations order ("DRO") that is not a QDRO. Second, plans must follow a domestic relations order to the extent the order is a QDRO.

2) A QDRO gives an individual, who is known as alternate payee, the status of a plan beneficiary. Thus, such an individual may use all the ERISA mechanisms to exercise and enforce those benefit rights. The laws governing federal retirement, life insurance, and annuity benefits do not do this. Nor do the New York State laws governing state and local retirement, life insurance, and annuity benefits do this.

3) There are two distinct kinds of QDRO requirements.

First, there are disclosure requirements, *viz.*, the DRO must clearly specify the plan, the participant, the payee, and the amount and timing of the benefit payments to which the payee is entitled. ERISA § 206(d)(3)(C). Thus, the participant should know the rights he is surrendering, and the plan may easily follow the DRO that is the beneficiary designation. This is similar to the requisite language for a DRO that may govern federal retirement benefit payments. *See, e.g.*, 5 C. F. R.§§ 838.302-304

Second, there are substantive requirements, *viz.*, the DRO must give the designated beneficiary the right to a benefit from the plan, ERISA § 206(d)(3)(B)(i)(1), the DRO designation must be consistent with the pension plan's terms, ERISA § 206(d)(3)(D)(i), but not increase the plan's actuarial costs. ERISA § 206(d)(3)(D)(ii).

4) A QDRO may give an individual the right to obtain a benefit payment, independent of the form and timing of the benefit payments chosen by or not chosen by the participant (often

called a "separate interest" approach). Moreover, a QDRO may give a former spouse the same benefit rights as the participant's spouse, even if the participant has another actual spouse. ERISA § 206(d)(3)(F).

5) A more detailed discussion of qualified domestic relations orders, including sample QDROs and QDRO language, may be found at http://www.dol.gov/ebsa/publications/qdros.html (last visited April 15, 2015) and http://www.pbgc.gov/documents/qdro.pdf (last visited April 15, 2015) and Internal Revenue Service Notice 95-10, 1997-1 C.B. 379 (1997) available at http://www.irs.gov/pub/irs-irbs/irb97-02.pdf (last visited April 15, 2015).

ERISA § 514. Other laws (b) Construction and application.

(7) *Subsection (a) [the preemption of state laws "related to" any ERISA plan] shall not apply to qualified domestic relations orders (within the meaning of section 206(d)(3)(B)(i)* [29 U.S.C. § 1056(d)(3)(B)(i)]

Conclusions from statutory text:

1) The purpose of this provision is not obvious from its face because it is not needed to determine that ERISA does not preempt QDROs. This lack of preemption is a consequence of ERISA § 206(d)(3)(A) which declares that "Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order."

See Feuer's Benefit Rights, 251-59 (a general discussion of the adoption of the QDRO provisions and the significance of those provisions, including their reversal of at least a portion of the Supreme Court *Campa* decision).

C. ERISA Explicit Domestic Relations Provisions Open Issues

1. To What Extent Must a Domestic Relations Order Comply with the QDRO Notice Requirements to Govern an ERISA Plan?

There is considerable disagreement in the courts about the extent to which a DRO may comply substantially with the QDRO disclosure requirements and still be a QDRO. For example would a DRO be a QDRO if the ERISA plan is not named correctly, if the address of the payee under the order is incorrect or missing, or if the name of the payee is missing. Such deficiencies,

if fatal, may not be easy to correct because in contested divorces parties often battle about all issues, and the deficiencies may not be apparent until after the participant's death, when it is difficult to amend domestic relations orders. *See generally* Albert Feuer, *How the Supreme Court and the Department of Labor May Dispel Myths about ERISA's Family Law Provisions and Protect the Benefit Entitlements That Arise Thereunder*, 45 J. MARSHALL L. REV. 635 at 758-59 (Spring 2012) ("*Feuer's ERISA Myths*") abstract and link to full article available at http://ssrn.com/abstract=2154053 (last visited April 15, 2015) (discussing the applicability of the substantial compliance doctrine to the QDRO qualification rules).

2. May a Potential Beneficiary of a QDRO Compel an ERISA Plan to Provide the Information Needed to Prepare the QDRO?

In order to prepare a QDRO, a potential payee must know the plan terms, the extent of the participant's ERISA plan benefits, the participant's benefit options, and the plan's QDRO application procedures. If the potential payee is a plan beneficiary, a beneficiary has the right to obtain much of this information, although it is not clear to what extent a beneficiary may obtain the participant's individual benefit information. ERISA §§ 502(a)(1)(A), 502(c)(1), 29 U.S.C. §§ 1132(a)(1)(A), 1132(c)(1). However, such access is unavailable if the potential payee is not a beneficiary when the order is sought, such as a dependent seeking support or a spouse who may have consented to a waiver of her interest in a Spousal Survivor Benefit Plan (such a consent almost never addresses the ability of the spouse to obtain plan benefits in the course of a marital dissolution). *Cf. Feuer's ERISA Myths* at 755-57 (arguing that it appears that ERISA may not give a potential payee disclosure rights that may be enforced) and Albert Feuer, *Which State-Law Reporting, Record-Keeping, and Disclosure Mandates Does ERISA Permit that Relate to State Criminal Laws, Insurance Laws, Healthcare Laws, Tax Laws, Domestic Relations Laws, Labor Laws, or Other State Laws?*, 41 J. OF PENSION PLAN. AND COMPLIANCE (Spring 2015) abstract and link to full article available at http://ssrn.com/abstract=2594114 (arguing that ERISA gives potential alternate payees the ability to compel ERISA plans to provide any information needed to produce a QDRO).

3. Is a Domestic Relations Order that Does Not Require the Relevant Plan to Make any Benefit Payments but Requires a Participant to Maintain, Make, or Refrain from Making Any Beneficiary Designation a QDRO?

There is considerable disagreement whether such orders are QDROs. Such orders include the automatic restraining orders that are generally filed at the start of contested matrimonial actions, **N.Y. Dom. Rel. L. § 236 Part B. 2. b.** They also include orders that direct a party to

choose a specific person as a designee for a life insurance benefit. **N.Y. Dom. Rel. L. § 236 Part B. b.8**

> *Cf. LaVelle v. LaVelle*, No. 1:11 CV 600, 2011 U.S. Dist. LEXIS 74890 (N.D. Ohio July 12, 2011) (an order requiring that a life insurance designation be maintained is not a QDRO) and *Unicare Life & Health Ins. Co. v. Phanor*, 472 F. Supp. 2d 8 (D. Mass.2007) (an order requiring that a participant refrain from changing a life insurance designation is a QDRO).

See generally Feuer's ERISA Myths, at 745-48. However, it seems likely that since the court could have issued an order granting the benefit to a person other than ordered party prior to its distribution it may do the same after the benefit has been distributed to the same party to the matrimonial action.

4. May a Pre-Nuptial or Post-Nuptial Agreement Pertaining to Benefits from a Spousal Survivor Benefit Plan be Incorporated Within a QDRO?

As discussed previously, a prenuptial or postnuptial agreement may not determine the benefit rights of a participant's spouse to a Spousal Survivor Benefit Plan. Nor may such an agreement be used to compel a participant's spouse to execute a consent to a waiver of his or her spousal benefits, which would make the prenuptial effective in practice. However, there is no ERISA requirement that any of those ERISA spousal benefits be continued after a marital dissolution. In fact, the right to such benefits ceases upon a legal separation or a marital dissolution absent explicit terms to the contrary in the plan or the dissolution instrument. Treas. Reg. § 1.401(a)-20 Q & A-27. Thus, ERISA does not prevent inclusion of those terms in an instrument of divorce or marital dissolution.

> *Cf. Edmonds v. Edmonds*, 184 Misc. 2d 928; 710 N.Y.S.2d 765 (Sup. Ct., Onondaga Co. 2000); and *Moor-Jankowski v. Moor-Jankowski*, 222 A.D.2d 422, 634 N.Y.S.2d 728 (2d Dep't 1995) (holding waivers of pre-nuptial waiver of rights to equitable distribution based on the participant's interest in an ERISA Spousal Survivor Plan are effective when the equitable distribution is determined).

5. May a Spousal Survivor Benefit Plan Include a Revocation Upon Divorce Provision?

There is controversy about whether a revocation upon divorce provision is an advisable or permissible provision in a Spousal Survivor Benefit Plan. In particular, does such a provision violate the alienation prohibition applicable to such plans. The provision in concert with the

divorce decree seems to constitute an arrangement whereby the default designee acquires a right that is enforceable against the plan to all of a plan benefit which was previously payable to the divorcing spouse. Thus, it appears to be included within the statutory phrase of a "prohibited alienation." Treas. Reg. § 1.401(a)-13(c)(1). Such provision also imposes a double payment risk on pension plans that do not learn of a divorce until after making the pension benefit payment because there are no relief provisions available similar to those applicable to plans that disregard unknown QDROs while fulfilling their fiduciary responsibilities. ERISA § 206(d)(3)(I), *See generally, Did a Unanimous Supreme Court Misread ERISA, Misread the Court's Precedents, Undermine Basic ERISA Principles, and Encourage Benefits Litigation?* , 37 COMP. PLAN. J. 247, 261-64 (Oct. 2, 2009), abstract and link to full article available at available at http://ssrn.com/abstract=1485204 (last visited April 15, 2015) (presenting the arguments for and against the use of revocation upon divorce provisions by Spousal Survivor Benefit Plans).

6. Are the QDRO Rules Applicable to ERISA Plans that are Not Spousal Survivor Benefit Plans, such as Top-Hat Plans or Life Insurance Plans?

There is considerable disagreement whether the QDRO rules are applicable to all ERISA plans or just to the Spousal Survivor Benefit Plans. By definition the latter are the only ERISA plans that must provide spousal protections during the participant's marriage. Thus, it is reasonable to conclude they are the only plans that must provide protections to former spouses and a participant's dependents (thereby depriving the participant of certain benefits) following the dissolution of a participant's marriage by permitting the participant to be deprived of certain ERISA benefits if the domestic relations order complies with specified notice and substantive conditions. This distinction is also consistent with the ERISA limitation to Spousal Survivor Benefit Plans of (1) the requirement that plans establish reasonable procedures to review whether a domestic relations order is a QDRO; and (2) the availability double payment relief when the plan administrator satisfies its fiduciary duties. Under this approach the sponsors of other plans may choose the extent to which they wish those plans to provide default spousal benefits and to defer to domestic relations orders. Advocates of the contrary position often assert that the ERISA § 514(b)(7) declaration that ERISA does not preempt QDROs implies that QDROs need not be restricted to Spousal Survivor Benefit Plans and ERISA shows an intention that former spouses receive the same protections from all ERISA plans.

> *See Kennedy v. Plan Adm'r of the Du Pont Sav. and Inv. Plan*, 555 U.S. 285, at 302 (2009) (presenting an example of a domestic relation order that is a QDRO, which governed a life insurance plan); *Metro. Life Ins. v. Wheaton*, 42 F.3d 1080 (7th Cir. 1994) (cited by *Kennedy* and approving a domestic relations order directed at an ERISA life insurance plan) and *Metro. Life Ins. Co. v. Bigelow*, 283 F.3d 436 (2d Cir. 2002)

(directing an ERISA life insurance plan to pay decedent's daughters rather than his father who he named contrary to the requirements of a divorce decree) and *Cf. Feuer's ERISA Myths* at 741-45 (arguing that the QDRO rules apply only to Spousal Survivor Benefit Plans).

7. If the QDRO Rules Are Not Applicable to ERISA Plans that are Not Spousal Survivor Benefit Plans, such as Top-Hat Plans or Life Insurance Plans, How are such plans affected by domestic relations orders?

There is no consensus on the treatment of ERISA plans that are not Spousal Survivor Benefit Plans, such as Top-Hat Plans or Life Insurance Plans, if, *arguendo*, the plans are not subject to the QDRO Rules.

On the one hand, federal and local government life insurance plans are generally subject to domestic relations orders that do not compel plans to change any of their terms. The local government version of top-hat plans, Code Section 457 plans, are not exempt under state law from domestic relations orders. Thus, it would seem reasonable and consistent with *Mackey* to presume that ERISA plans not subject to the QDRO rules, such as Code Section 457 plans sponsored by tax-exempt entities, must defer to all DROs that give a person a fraction of the benefits that the plan will otherwise pay.

On the other hand, no ERISA provision provides for such deference. Thus under *Kennedy*, such orders may not affect the payment of plan benefits unless the orders are consistent with plan terms. Moreover, it seems most reasonable to interpret ERISA § 514(b)(7) as providing that plan benefits are subject to domestic relations orders only to the extent that the plan terms provide for such deference (QDROs are made part of the plan terms). *See Feuer's ERISA Myths* at 739-40.

There is then a question about the extent to which ERISA benefits may be subject to domestic relations orders after their distribution. The answer most consistent with the ERISA preemption provisions would appear to be that support orders that do not depend on the ownership of the plan benefits may govern distributed benefits but orders that depend on the ownership of plan benefits may not be applied before or after the benefits are distributed. *See generally Feuer's Benefit Rights* at 290-93, 376.

8. May a State Contract Claim Arising from a Domestic Relations Order be used to Wrest ERISA Plan benefits that have been distributed to a plan participant or beneficiary?

A number of courts have relied on footnote 10 from *Kennedy* to find that the estate of the participant may make a state-law contract claim arising from a separation agreement incorporated in the divorce decree to wrest survivor benefits that have been distributed to the former spouse of a participant pursuant to the terms of an ERISA pension plan. In particular, the argument is that the former spouse is obligated to give the amount of the plan benefit payment it received to the participant's estate. This claim arises from the former spouse breaching the separation agreement (contract) with the participant to give up any interest in the participant's plan benefits. *See generally* Andy Oringer and Albert Feuer, *In the Pursuit of Domestic Tranquility—Matrimonial Attorneys Should Follow The Bouncing Beneficiary Designations*, 43 COMP. PLANNING J. 43 (March 2015), abstract and link to full article available at http://ssrn.com/abstract=2587419 (last visited April 15, 2015).

Permitting such wresting of benefits is contrary to the treatment of federal and state retirement benefits. In both cases, benefits that are protected before their distribution from a DRO also appear to be protected afterwards. In both cases, there is also no basis for finding that a contract claim arising from a domestic relation order that may not be used to compel such a plan to pay benefits to a person other than the designated beneficiary may be used to wrest distributed benefits from the beneficiary. Moreover, the Supreme Court held that there is similar post-distribution protection from state-law claims for federal life insurance benefits.

> *See Hillman*, in which the Court in explaining its decision to accept certiorari referred to a desire to resolve a conflict among decisions including a decision that rejected a contract-based claim for distributed benefits because the claim was not consistent with the plan terms, as had occurred in Kennedy with an inconsistent federal common law claim. *O'Neal v. Gonzalez*, 839 F. 2d 1437 (11th Cir. 1988).

Such a discrepancy in benefit protection would be particularly troubling because ERISA is the one federal or local retirement plan statute whose dominating general purpose is the protection of the benefit rights of plan participants and beneficiaries. As discussed above, that purpose is achieved by the assurance that ERISA plan benefits, like benefits from those plans, be provided in accord with the plan terms.

> *Cf.*, *Andochick v. Byrd*, 709 F.3d 296 (4th Cir. 2013) (401(k) and life insurance benefits may be wrested from a beneficiary whose divorce decree included a release of such benefits when plan terms did not permit such a benefit release) and *Langevin v. McMorrow*, 2011 Mass. App. Unpub. LEXIS 810 (Mass. App. Ct. June 10, 2011) (§401(k) benefits may not be wrested from a beneficiary whose divorce decree included a waiver of such benefits when plan terms did not permit such a benefit waiver) and *Feuer's ERISA Myths*, at 729-33 (arguing that the distributed benefits may not be wrested from those entitled to the benefits under the ERISA plan terms).

Although this case-law has arisen in a very narrow set of circumstances described in the

next paragraph, it is conceivable that the argument could be broadened to question the applicability of the *Boggs* and *Egelhoff* findings that ERISA, like other federal statutes, protects distributed benefits against domestic relations orders that under *Kennedy* do not affect plan benefit payments. *See*, Lawrence W. Waggoner, *The Creeping Federalization of Wealth-Transfer Law*, 67 VAND. L. REV. 1635 (2014) (accepting that ERISA and other federal statutes protect distributed benefits under current law but arguing that this results in a very bad policy).

The facts in these post-*Kennedy* cases are very similar to those of *Kennedy*. In particular, the spouses execute a separation agreement which is later incorporated into a divorce decree. However, the separation agreement contains a provision in which the participant's spouse gives up his or her interest in the participant's ERISA plan benefits. The apparent aim of the provision is to permit the participant to choose another plan beneficiary during the period prior to the finalization of the divorce. After such finalization the presumed aim is to deprive the former spouse of any interest in the participant's ERISA plan benefits.

However, deferring to this spousal waiver raises four issues. First, as discussed above for Spousal Survivor Benefit Plans the provision is ineffective in the separation agreement even if paired with a provision that the spouse will agree not to claim the benefit, as is sometimes the case. Second, for ERISA plans that are not Spousal Survivor Benefit Plans, such as life insurance benefits the provision is only needed if the participant was otherwise committed to maintain such designation. None of the decisions mention such a commitment. Third, the participant in these cases does not change the plan designation either before the divorce or after the divorce when there is no restraint on the participant changing the designation. This suggests that the participant was not particularly interested in changing the beneficiary designation. Thus, the participant almost certainly gave up nothing to obtain such designation, which the participant had in any case following the divorce in the absence of a contrary provision in the divorce instrument. Fourth, the claim is made not by the default beneficiary but by the participant's estate, even though the participant seemed to have suffered no harm from the former spouse's actions.

Therefore, there appears to be no obvious public policy benefit to this deference, while violating the reason for the *Boggs* disallowance of a post-distribution benefits wresting cited above, *viz*., that "*It does not matter that respondents have sought to enforce their rights only after the retirement benefits have been distributed. since their asserted rights are based on the theory that they had an interest in the undistributed pension plan benefits. Their state-law claims are pre-empted." Id.* at 854.

9. When is a Support Order Enforceable Against an ERISA Plan?

If the only DRO that is enforceable against ERISA plans, or a subset of such plans, is a QDRO than the only support orders that are so enforceable are those that are QDROs or arise

from QDROs. *See, e.g.*, New York Family Court Form 4-23 (Child Support, Paternity–Qualified Domestic Relations Order) available at https://www.nycourts.gov/forms/familycourt/pdfs/4-23.pdf (last visited April 15, 2015). There is no similar restriction on support orders that are enforceable against federal or local government retirement plans. This distinction gives rise to obvious equitable concerns. If ERISA requires the plan to defer only to a DRO that is consistent with their plan terms, such as the terms of Spousal Survivor Benefit Plans requiring deference to QDROs, a support order will only be enforceable against the plan benefit payments from a Top-Hat Plans, SEP Plan, or a SIMPLE plan if their terms provide for such deference. Top-Hat Plans, unlike other plans, often provide for such deference. In contrast, SEP Plans and SIMPLE Plans do not. However, as discussed above support orders may be used to wrest benefit distribution from designees of such plans.

VII. Domestic Relations Provisions Applicable to Retirement Plans Other Than ERISA Plans, Or Plans Sponsored by Local Governments or the Federal Government

Special rules are applicable to retirement plans that are limited to owner-employees and their spouses. Such plans are not ERISA plans. 29 C.F.R. §§ 2510.3-3(b), 2510.3-3(c). Thus, they are not subject to the ERISA protections. Nevertheless, DROs applicable to such plans are subject to some similar restrictions. C.P.L.R. § 5205 prevents the enforcement of money judgments against such plans which are funded by tax-qualified trusts. Some domestic relations orders are exempt from this prohibition. C.P.L.R. § 5205(c).4. Orders of support, maintenance, or alimony are always enforceable. However, other DROs are only enforceable if they are QDROs. Limiting the DROs that may be enforced to QDROs is a tax-qualification requirement. Code § 401(a)(13). It would appear that by permitting support orders to be enforced which are not QDROs New York State law is preventing these owner-employee plans from being tax-qualified because they would not be operated in a manner consistent with the plan document. Treas. Reg. § 1.401-1(a)(2). Thus, the order would deprive the participants of the tax-qualification benefits of such plans, as well as the payment required by the order.

Although it may be argued that the QDRO restrictions of C.P.L.R. § 5205(c).4 are literally applicable to tax-qualified individual retirement accounts, it seems unlikely that any New York State court would prevent a DRO that was not a QDRO from being enforced against such benefits. The courts would probably note that the IRA agreement included no such QDRO restriction. Although owner-employee plans that are otherwise not tax-qualified may have QDRO provisions, it also appears unlikely that any New York State Court would prevent a DRO that was not a QDRO from being enforced against such plan benefits even though such enforcement is not consistent with the trust terms.

Conclusions

1) New York has extensive family and domestic relations law provisions to protect spouses, former spouses and dependents of individuals. These do not include the requirement that there be default spousal retirement, life insurance, or annuity benefits.

2) Family and domestic relations law provisions override the protections generally afforded to those with retirement, life insurance, and retirement benefits. Those laws do not require plans to pay any benefits which the plan terms prohibit. However, these laws may require that plans pay plan benefits to a person other than the creator of the benefits, such as the creator's former spouse.

3) Agreements between unmarried parties to override those protections would appear to have limited effectiveness in establishing entitlement to such benefits, even after those benefits have been distributed, but may result in enforceable claims against the breaching party's other assets, if any, such as individual bank and mutual fund accounts, except to the extent those account include deposits of otherwise exempt proceeds.

4) There are extensive provisions in federal law to protect spouses, former spouses, and dependents of individuals with rights to federal retirement or life insurance benefits, including default spousal survivor retirement benefits.

5) The federal retirement and life insurance benefit provisions appear to preempt the state elective law provisions even when there are no federal provisions providing default benefits to a participant's spouse.

6) The federal retirement and life insurance benefit provisions largely incorporate those domestic relations orders that meet federal form and explicit reference requirements.

7) ERISA provides for deference to certain domestic relations orders that require pension benefit payments not otherwise permitted under the plan terms, such as payments to former spouses without regard to whether the participant is receiving any payments.

8) There is considerable controversy about the extent to which the federal preemption of state marital and domestic relations law extends to plan distributions, particularly for payments that are not subject to support orders.

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Retirement, Annuity and Life Insurance Benefit Planning
Family and Domestic Relations Law Rights to
Retirement, Annuity and Life Insurance Benefits

Competing Equitable Principles that Often Create Family Law/Domestic Relations Issues:

The Importance of Meeting Family Obligations
The Societal Value of Retirement, Life Insurance and Annuity Benefits
The Sanctity of Contracts

"While cohabitation without marriage does not give rise to the property and financial rights which normally attend the marital relation, neither does cohabitation disable the parties from making an agreement within the normal rules of contract law"

Morone v. Morone, 50 N.Y.2d 481 (N.Y. 1980), 413 N.E.2d 1154

Two Sample Families Who Differ Only in Their Names, Marital Status and Sex of Children and Whether the Adult Partners are Married or Not

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Married Couple

Harry and Wendy, who are Husband and Wife
Sarah is Wendy's Sister
Donna is the 10-year-old daughter of Harry and Wendy

Unmarried Couple

Peter and Grace, who are Unmarried Partners
Bruce is Grace's Brother
Sam is the 10-year-old son of Peter and Grace

Interests in Sample Assets which May, but Need Not, Generate Payments to the Two Families

Individual Payable-on-Death Bank Account

Individual Life Insurance

Benefit from Tax-Qualified Pension Plan Restricted to Owner-Employees

Individual IRA Benefit

New York State Teachers Retirement System Pension ("NYS Pension") Benefit

Federal Life Insurance Plan ("FEGLIA") Benefit

Civil Service Retirement System ("CSRS") Benefit

ERISA Life Insurance Plan Benefit

Social Security Benefit

ERISA Spousal Survivor Benefit Plan Benefit

Planned Presentation:

First, we will discuss the family law rights and responsibility issues pertaining to each of the above assets while the marriage or the unmarried partnership is in effect:

- ♦ Support obligations the partners owe to their children
- ♦ Support obligations the partners owe each other
- ♦ Default surviving partner benefits
- ♦ Spousal survivor benefits

Second, we will discuss the issues pertaining to each of the above assets when the marriage or the unmarried partnership is ending or has ended (for simplicity all marital dissolutions will be described as divorces):

- ♦ Effects of the automatic freeze during a contested matrimonial action
- ♦ Default spousal beneficiary changes as a result of a divorce
- ♦ Disposition of assets as a result of a divorce.

Basic Family Law Principles

New York family law requires parents to support their minor children, and spouses are required to support each other. N.Y. Family Ct. Act §§ 413, 414. The Internal Revenue Service may enforce delinquent child support obligations as if the obligations were a Federal income tax, the collection of which would be jeopardized by delay. Code § 6305. This collection tool may be applied to all the benefits discussed herein. Spouses may contract to give up their support rights against their spouse or to receive specified maintenance allowances.

New York law provides a decedent's surviving spouse with a default interest in the decedent's probate estate. If there is no will the surviving spouse will be entitled to (1) the larger of $50,000 or one half of the decedent's probate estate if the decedent is survived by issue, of (2) all of the decedent's probate estate. N.Y. E. P. T. L. § 4-1.1. The surviving spouse may not be deprived of any interest in the decedent's property by a will that gives the survivor no or little property.

New York law provides a decedent's surviving spouse with a right to elect against the decedent's elective estate, which includes but is not limited to the decedent's probate estate. N.Y. E. P. T. L. § 5-1.1-A. The surviving spouse is entitled to an amount equal to the larger of $50,000 or one third of the decedent's elective estate. N.Y. E. P. T. L. § 5-1.1-A(a)(2). *For simplicity, we will disregard the family exemption amount of up to $92,500 available to a surviving spouse under N.Y. E. P. T. L. § 5-3.1*.

If Harry survives Wendy he would prefer to have Wendy's elective estate include $300,000 if it is left to Bruce, but not if it is left to him. In the former case Harry would be entitled to $100,000 more but in the latter $200,000 less. For example if Wendy otherwise left a probate estate of $1,200,000 to Donna, Harry would be entitled to $400,000. Adding the $300,000 share would increase his total share to $500,000. However, excluding his $300,000 share increases his total to $700,000.

Example (1): Suppose each adult in the two families owns only individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend.

Family Law Rights and Responsibilities:

Support Obligations to the Minor Children.

Both families have the same obligation to support their respective minor child, which under N.Y. Family Ct. Act § 413 depends on the couple's income and assets. The support obligation may be enforced in the same way against each partner's wages or bank accounts

Support Obligations to the Other Adult.

The married partners, Harry and Wendy may rely on a statute N.Y. Family Ct. Act § 412 which, unlike the child support statute, does not set forth specific support guidelines. The unmarried partners, Peter and Grace, must rely on an explicit contract. The married adults may also do so, but the courts are more deferential to contracts between unmarried adults in which the parties have no fiduciary or statutory duties to each other. Support obligations that arise under the statute or under the contract may be enforced in the same way against a partner's wages or bank accounts.

Example (1a): Suppose each adult in the two families owns only individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend. Suppose Wendy and Grace predecease their respective partners.

Spousal Survivor Benefits

Default Surviving Partner Benefits

In both cases there is no statutory obligation for an individual to name the individual's the spouse or partner as the beneficiary of the bank accounts. In some cases, the default beneficiary for a bank account is the surviving spouse of the decedent. In some cases, the default beneficiary of a married participant for a bank account is the participant's surviving spouse. In some cases, the default beneficiary of an unmarried participant is the participant's surviving child or children. In other cases, the default beneficiary is the decedent's estate.

Thus Wendy could name Sarah her beneficiary under her bank accounts, and Grace could do the same for Bruce. However, in both cases contracts to the contrary could be enforced by the surviving partner, Harry or Peter against the bank account proceeds.

There is a default surviving spouse benefit from probate assets for the married couple, but none for a married couple. If there is no will, Harry will be entitled to one half of the decedent's probate estate. N.Y. E. P. T. L. § 4-1.1. In this case the probate estate is limited to the decedent's personal property and the decedent's unpaid wages unless the beneficiary of the decedent's bank account is the decedent's estate. In that case, Harry would also be entitled to half those assets.

Example (1a): Suppose each adult in the two families owns only individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend. Suppose Wendy and Grace predecease their respective partners.

Spousal Survivor Benefits

Spousal Survivor Benefit Elections

The surviving spouse may elect to receive to one third of the value of the elective estate, which in this case consists of the probate estate and the bank accounts. N.Y. E. P. T. L. §§ 5-1.1-A (a) and (d). An unmarried partner has no such right, but may contract for such a right or the right to specific property and the surviving partner may enforce those rights in a similar fashion to the married partner's enforcement of the partner's elective share rights.

The married partner may waive the elective share right in a written contract that is executed in a formalistic manner before or during the marriage. N.Y. E. P. T. L. §§ 5-1.1-A (a) and (e).

Example (2): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, and (ii) individual life insurance policies.

Family Law Rights and Responsibilities:

Other than including the policies as a family or spousal asset, there is no change in the results for the support obligations for children or an adult partner. Moreover, life insurance proceeds received by family members are considered in determining the income of the families for purposes of the child support guidelines. N.Y. Family Ct. Act § 413. 1(e)(4)

Example (2a): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, and (ii) individual life insurance policies. Suppose Wendy and Grace predecease their respective partners.

Spousal Survivor Benefits

Default Surviving Partner Benefits

In both cases there is no statutory obligation for an individual to name the individual's partner as the beneficiary of the life insurance policy. In some cases, the default beneficiary of a married participant for a life insurance policy is the participant's surviving spouse. In some cases, the default beneficiary of an unmarried participant for a life insurance policy is the participant's surviving child or children. In other cases, the default beneficiary is the decedent's estate.

Thus, Wendy could name Sarah her beneficiary, and Grace could do the same for Bruce. However, in both cases contracts to the contrary could be enforced in theory by the surviving partner, Harry or Peter. The difficulty is that the contract claim may not be enforced against the recipient of the insurance benefits. N.Y. Ins. L. § 3212(b). However, the claim, as a debt of the decedent, may be enforced against the probate assets and the bank accounts of the decedent.

The intestate rules only affect the insurance proceeds if the beneficiary is the decedent's estate in which case those rules control if the decedent does not leave a will which is probated.

Example (2a): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, and (ii) individual life insurance policies. Suppose Wendy and Grace predecease their respective partners.

Spousal Survivor Benefits

Spousal Survivor Benefit Elections

The New York courts have held that life insurance proceeds payable on the decedent's death are not included in a decedent's elective estate. Thus, absent a contract the surviving partner would be entitled to none of the insurance proceeds, and as discussed above there may no practical way to enforce the contract. Annuity survivor benefits may be included in the elective estate.

N.Y. E. P. T. L. §§ 5-1.1-A (b) (1) (F).

Any disposition of property or contractual arrangement made by the decedent, in trust or otherwise, to the extent that the decedent (i) after August thirty-first, nineteen hundred ninety-two, retained for his or her life or for any period not ascertainable without reference to his or her death or for any period which does not in fact end before his or her death the possession or enjoyment of, or the right to income from, the property except to the extent that such disposition or contractual arrangement was for an adequate consideration in money or money's worth [IRC § 2036][added 1992]; or (ii) at the date of his or her death retained either alone or in conjunction with any other person who does not have a substantial adverse interest, by the express provisions of the disposing instrument, a power to revoke such disposition or a power to consume, invade or dispose of the principal thereof [IRC §§ 2038 and 2041] . . .

Example (3): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, and (iii) benefits in a tax-qualified pension plan restricted to owner-employees.

Family Law Rights and Responsibilities:

Other than including the plan benefits as a family or spousal asset, there is no change in the results for the support obligations for children or an adult partner. Enforcement of these obligations may, however, create substantial issues. Tax-qualified pension plan documents must provide that the only domestic relations order to which they may defer to is one that is a qualified domestic relations order ("QDRO"). Such orders as discussed in example (10), unlike many support orders are not garnishment orders. If the support order is a statutory order, but not a QDRO, the plan still has to comply with the order. N.Y. C. P. L. R. § 5205(c).4. However, this will cause the plan to lose its tax-qualification because it is not operating pursuant to its plan documents. In contrast, support obligations arising from a contract are not enforceable against such plans or the distributions from such plans. N.Y. C. P. L. R. §§ 5205(c).1 and (d).1. Thus, such obligations may not be enforced against bank account assets derived from such benefit payments.

Example (3a): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, and (iii) benefits in a tax-qualified pension plan restricted to owner-employees. Suppose Wendy and Grace predecease their respective partners.

Spousal Survivor Benefits

Default Surviving Partner Benefits

In neither case may the surviving partner enforce a statutory obligation to obtain the survivor benefits of the deceased partner if he is not the plan beneficiary. However, if Harry or Wendy wishes their respective plans to be tax-qualified, the plan documents must provide that their spouse is the beneficiary unless the participant's spouse has consented to the participant's waiver of such benefit. In contrast, the plan documents of a tax-qualified plan need not, and almost never, provide that Peter or Grace's partner is their respective beneficiary. In some cases, the default beneficiary of an unmarried participant for a tax-qualified plan is the participant's surviving child or child. In other cases, the default beneficiary is the decedent's estate, in which case the intestate rules control if no will is probated.

If Wendy's plan documents satisfied the tax-qualification rules, Harry could rely on the plan documents to obtain the survivor benefit, *unless he waived his right to the benefit*. Peter could not rely on the plan documents, but may rely on a contract. However, such contract could not be enforced against the proceeds payable to Bruce. N.Y. E. P. T. L. § 13-3.2. The contract could be enforced only against Grace's probate assets and bank accounts which may lack sufficient value to pay the claim.

Example (3a): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, and (iii) benefits in a tax-qualified pension plan restricted to owner-employees. Suppose Wendy and Grace predecease their respective partners.

Spousal Survivor Benefits

Spousal Survivor Benefit Elections

Harry makes his benefit election when he decides whether to waive his spousal survivor benefit entitlement. Harry would have no claim if Wendy designated Sarah as her beneficiary because he would have had to approve such a designation for it to be effective. Peter has no benefit election.

Harry would have a different concern if he received Wendy's survivor benefits because the pension benefits are included in Wendy's elective estate and could thereby diminish his elective share. However, *under the elective share rules for most tax-qualified plans only half of the benefit is included in the elective shares*. Thus, if Harry received $180,000 from the pension plan, $90,000 would be excluded from his elective share and thereby increase his total assets derived from the elective estate and the pension plan by $90,000 as discussed before.

Example (4): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, and (iv) benefits in an individual IRA.

Family Law Rights and Responsibilities:

Other than including the IRA plan benefits as a family or spousal asset, there is no change in the results for the support obligations for children or an adult partner. As with the pension plan benefits discussed above, the statutory support obligation could be obtained from the IRA benefits, but not the contract support obligation. The latter also could not be obtained from IRA benefit payments deposited in the bank accounts.

Example (4a): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, and (iv) benefits in an individual IRA. Suppose Wendy and Grace predecease their respective partners.

Spousal Survivor Benefits

Default Surviving Partner Benefits

In both cases there is no statutory obligation for an individual to name the individual's partner as the IRA beneficiary. In some cases, the default IRA beneficiary of a married participant is the participant's surviving spouse. In some cases, the default beneficiary of an unmarried participant for a life insurance policy is the participant's surviving child or child. In other cases, the default beneficiary is the decedent's estate. These results would not change if the IRAs were created by Wendy, and Grace respectively, or if they were the beneficiaries of IRAs created by other persons.

Thus, Wendy could name Sarah her beneficiary, and Grace could do the same for Bruce. However, in both cases contracts to the contrary could be enforced in theory by the surviving partner, Harry or Peter. The difficulty is that the contract claim may not be enforced against the recipient of the IRA benefits as with the pension benefits. However, as a debt of the decedent the claim may be enforced against the probate assets and the bank accounts of the decedent, except to the extent those assets came from the pension or IRA benefits.

The intestate rules have no effect on IRA survivor benefits unless the beneficiary is the decedent's estate in which case those rules control if the decedent does not leave a will which is probated.

Example (4a): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, and (iv) benefits in an individual IRA. Suppose Wendy and Grace predecease their respective partners.

Spousal Survivor Benefits

Spousal Survivor Benefit Elections

If Wendy chose Sarah as her IRA beneficiary, Harry may be able to elect to obtain his right to a share of Wendy's elective estate. However, he could not do so and exercise a contract claim to the IRA survivor benefits and thereby obtain more than his elective share. As discussed above Harry could not compel Sarah to pay her the benefit under the contract claim, but could do so under the elective share claim. Thus, it may be more practical to pursue the elective share claim.

In contrast, Harry would have a different concern if he received Wendy's survivor benefit because the IRA benefits are included in Wendy's elective estate and could thereby diminish his elective share. Moreover, unlike most tax-qualified pension benefits they are fully included in the elective estate. N.Y. E. P. T. L. §§ 5-1.1-A (b) (1) (G).

Example (5): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) individual IRA benefits, and (v) a NYS Pension plan benefit.

Family Law Rights and Responsibilities:

Other than including the NYS Pension plan benefits as family or spousal asset, there is no change in the results for the support obligations for children or an adult partner. The collection results are similar to those for IRAs. Statutory support obligations may be collected but not contractual obligations from either the NYS Pension plan or the benefit recipient.

Example (5a): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) individual IRA benefits, and (v) a NYS Pension plan benefit. Suppose Wendy and Grace predecease their respective partners.

Spousal Survivor Benefits

Default Surviving Partner Benefits

In both cases there is no statutory obligation for an individual to name the individual's partner as the NYS Pension plan beneficiary. The default NYS Pension plan beneficiary in case of a pre-retirement death is the decedent's estate. N. Y. Educ. L. § 512.

Unlike federal pension benefits the expectation is that elective share rules will protect the surviving spouse, although the default retirement benefit payment for a NYS employee is a single life annuity in which case there is no survivor benefit to be considered by the elective share rules. N. Y. Educ. L. § 511.

Thus, Wendy could name Sarah her beneficiary, and Grace could do the same for Bruce. However, in both cases contracts to the contrary could be enforced by the surviving partner, Harry or Peter. The difficulty is that the contract claim may not be enforced against the recipient of the NYS Pension plan beneficiary. N.Y. EDUC. § 524. However, as a debt of the decedent the claim may be enforced against the probate assets and the bank accounts of the decedent, except to the extent that proceeds that are otherwise exempt were deposited therein.

Example (5a): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) individual IRA benefits, and (v) a NYS Pension plan benefit. Suppose Wendy and Grace predecease their respective partners.

Spousal Survivor Benefits

Spousal Survivor Benefit Elections

If Wendy chose Sarah as her NYS Pension plan beneficiary, Harry could exercise his right to a share of Wendy's elective estate. However, he could not do so and exercise a contract claim to the IRA survivor benefits and thereby obtain more than his elective share. As discussed above Harry could not compel Sarah to pay her the benefit under the contract claim, but could do so under the elective share claim. Thus, it may be more practical to pursue the elective share claim.

In contrast, Harry would have a different concern if he received the survivor benefit because the NYS Pension plan benefit is included in Wendy's elective estate and could thereby diminish his elective share. Moreover, unlike many private pension benefits the benefit, which is not subject to Section 401(a)(11) of the Internal Revenue Code of 1986, as amended (the "Code"), is fully included in the elective estate. N.Y. E. P. T. L. §§ 5-1.1-A (b) (1) (G).

Example (6): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) individual IRA benefits, (v) a NYS Pension plan benefit, and (vi) a federal life insurance ("FEGLIA") benefit.

Family Law Rights and Responsibilities:

Other than including the FEGLIA plan benefits as a family or spousal asset, there is no change in the results for the support obligations for children or an adult partner. 42 U.S.C. § 659. Again statutory support obligations are enforceable against the plan, but contract support claims are not so enforceable. The contract support claims are probably enforceable against the distributed benefits.

Example (6a): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) individual IRA benefits, (v) a NYS Pension plan benefit, and (vi) a FEGLIA plan benefit. Suppose Wendy and Grace predecease their respective partners.

Spousal Survivor Benefits

Default Surviving Partner Benefits

In both cases there is no statutory obligation for an individual to name the individual's partner as the FEGLIA plan beneficiary. The default FEGLIA plan beneficiary is the surviving spouse, if any. 5 U.S.C. § 8705(a).

Thus, Wendy could name Sarah her beneficiary, and Grace could do the same for Bruce. However, in both cases contracts to the contrary may be enforced by the surviving partner, Harry or Peter. The difficulty is that the contract claim may not be enforced against the recipient of the FEGLIA plan beneficiary. *Hillman v Maretta*, 569 U.S. ___, 133 S. Ct. 1943 (2013) (FEGLIA preempts the use of state revocation upon divorce laws to wrest benefit distributions from beneficiaries because of the importance of protecting the federal beneficiary designation). However, as a debt of the decedent the claim may be enforced against the probate assets and the bank accounts of the decedent, except to the extent that proceeds that are otherwise exempt were deposited therein.

Example (6a): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) individual IRA benefits, (v) a NYS Pension plan benefit, and (vi) a FEGLIA benefit. Suppose Wendy and Grace predecease their respective partners.

Spousal Survivor Benefits

Spousal Survivor Benefit Elections

Harry could not rely on his elective share rights to obtain a portion of the FEGLIA benefit because life insurance benefits, whether from an individual or a group policy are not included in the elective estate.

Harry would have no elective estate concerns if he received the death benefit because life insurance benefits, whether from an individual or group policy are not included in a decedent's elective estate.

Example (7): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) individual IRA benefits, (v) a NYS Pension plan benefit, (vi) a FEGLIA benefit, and (vii) a Civil Service Retirement System ("CSRS") pension benefit.

Family Law Rights and Responsibilities:

CSRS pension plan benefits are included as a family or spousal asset, and may be subject to orders to satisfy the statutory support obligations for children or an adult partner. 42 U.S.C. § 659. However, the support orders will only be effective if they comply with the federal rules with respect to acceptable garnishment orders, which require information "sufficient to identify the obligor." *See generally* 5 C. F. R. §§ 581.203. As with NYS pension plan benefit contractual support obligations may not be enforced against the CSRS or the CSRS pension payments.

Example (7a): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) individual IRA benefits, (v) a NYS Pension plan benefit, (vi) a FEGLIA benefit, and (vii) a Civil Service Retirement System ("CSRS") pension benefit.

Spousal Survivor Benefits

Default Surviving Partner Benefits

There is a statutory obligation for a civil service employee to name the employee's spouse, if any, as the beneficiary of the pension plan. Moreover, the spouse must remain as the beneficiary unless the participant's spouse has consented to the participant's waiver of such benefit. Such waiver must be made in writing on a specified federal form. 5 C.F.R. § 831.614. Thus, Wendy would need Harry's consent to name Sarah as her beneficiary.

In contrast, Grace could name Bruce as his beneficiary without Peter's consent. Peter could rely on a contract to provide her with such beneficiary rights. However, such contract could not be enforced against the proceeds payable to Bruce. 5 U.S.C. § 8346(a). The contract could be enforced only against Grace's probate assets and bank accounts, except to the extent exempt proceeds have been deposited therein, which may not be sufficient to pay the claim.

Example (7a): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) individual IRA benefits, (v) a NYS Pension plan benefit, (vi) a FEGLIA benefit, and (vii) a Civil Service Retirement System ("CSRS") pension benefit. Suppose Wendy and Grace predecease their respective partners.

Spousal Survivor Benefits

Spousal Survivor Benefit Elections

Harry makes his benefit election when he decides whether to waive his spousal survivor benefit entitlement. Harry would have no claim if Wendy designated Sarah as her beneficiary because he would have had to approve such a designation for it to be effective.

Harry would have no elective estate concerns if he received the death benefit because federal retirement benefits are excluded from the elective estate even though they appear to be fully included. N.Y. E. P. T. L. § 5-1.1-A (b)(1)(G).

This elective estate exclusion is implied by two Supreme Court decisions:

Free v. Bland, 369 U.S. 663 (1962) (State community property law may not be used to wrest benefit from a joint owner of U. S. Savings bond) and *Boggs v. Boggs*, 520 U.S. 833 (1997) (state community property law may not be used to wrest ERISA benefits from the designated beneficiary).

Example (8): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) individual IRA benefits, (v) a NYS Pension plan benefit, (vi) a FEGLIA benefit, (vii) a CSRS benefit, and (viii) ERISA life insurance benefit.

Family Law Rights and Responsibilities:

ERISA permits the inclusion of the ERISA life insurance benefit as a family or spousal asset. There is no federal statute, such as 42 U.S.C. § 659, that explicitly provides for deference of ERISA plans to support orders. However, ERISA provides for deference to a domestic relations order that is a QDRO. Thus, one may argue that deference is required for a support order that is a QDRO. Contractual-based support claims could not rely on this QDRO approach. On the other hand, it may be argued that ERISA limits QDROs to orders that are directed at ERISA plans that must provide Spousal Survivor Benefits. Such plans exclude life insurance plans, but are a subset of ERISA retirement plans. Under this analysis, the statutory and contract support claims are probably enforceable against the distributed benefits because preemption is not based on a federal alienation prohibition.

Example (8a): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) individual IRA benefits, (v) a NYS Pension plan benefit, (vi) a FEGLIA benefit, (vii) a Civil Service Retirement ("CSRS") pension benefit, and (viii) ERISA life insurance benefit. Suppose Wendy and Grace predecease their respective partners.

Spousal Survivor Benefits

Default Surviving Partner Benefits

In both cases there is no statutory obligation for an individual to name the individual's partner as the plan beneficiary. In some cases, the default beneficiary of a married participant is the participant's surviving spouse. In some cases, the default beneficiary of an unmarried participant is the participant's surviving child or children. In other cases, the default beneficiary is the decedent's estate.

Thus, Wendy could name Sarah her beneficiary, and Grace could do the same for Bruce. However, in both cases contracts to the contrary could be enforced in theory by the surviving partner, Harry or Peter. The difficulty is that the contract claim may not be enforced against the recipient of the ERISA plan benefits for the same reason that they may not be enforced against a FEGLIA plan beneficiary:

> An employee's ability to name a beneficiary acts as a ''guarantee of the complete and full performance of the contract to the exclusion of conflicting claims.'' *Wissner*, 338 U. S., at 660 (1950). *With that promise comes the expectation that the insurance proceeds will be paid to the named beneficiary and that the beneficiary can use them. Hillman,* 133 S. Ct. at 1953-54.

Example (8a): Suppose each adult in the two families owns only (i) individual payable-on-death

bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) individual IRA benefits, (v) a NYS Pension plan benefit, (vi) a FEGLIA benefit, (vii) a Civil Service Retirement ("CSRS") pension benefit, and (viii) ERISA life insurance benefit. Suppose Wendy and Grace predecease their respective partners.

Spousal Survivor Benefits

Spousal Survivor Benefit Elections

Harry could not rely on his elective share rights to obtain a portion of the FEGLIA benefit because life insurance benefits, whether from an individual or a group policy are not included in the elective estate.

Harry would have no elective estate concerns if he received the death benefit because life insurance benefits are excluded from the elective estate.

Example (9): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) individual IRA benefits, (v) a NYS Pension plan benefit, (vi) a FEGLIA benefit, (vii) a Civil Service Retirement ("CSRS") pension benefit, (viii) ERISA life insurance benefit, and (ix) social security benefits.

Family Law Rights and Responsibilities:

Social security benefits are included as a family or spousal asset, and may be subject to orders to satisfy the support obligations for children or an adult partner. 42 U.S.C. § 659. However, the support orders will only be effective if they comply with the federal rules with respect to acceptable garnishment orders, which require information "sufficient to identify the obligor." *See generally* 5 C. F. R. §§ 581.203.

Example (9a): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) individual IRA benefits, (v) a NYS Pension plan benefit, (vi) a FEGLIA benefit, (vii) a Civil Service Retirement ("CSRS") pension benefit, (viii) ERISA life insurance benefit, and (ix) social security benefits. Suppose Wendy and Grace predecease their respective partners.

Spousal Survivor Benefits

Default Surviving Partner Benefits

There is no choice of a default surviving partner benefit. A worker's spouse, but not the worker's unmarried partner, is entitled a survivor benefit. 42 U.S.C. §§ 402 (e), (f), 416(e) and (f). Moreover, unlike federal pension benefits, the worker's spouse is entitled to spousal benefits while the worker is alive. 42 U.S.C. §§ 402(b), (c), 416(b) and (c). Unlike federal pension benefits, the worker's benefits are not reduced to pay for the spousal benefits. 42 U.S.C. § 402(a). Finally, spousal survivor benefits are only available to a worker's spouse if the benefits are greater than the benefit to which the spouse would be entitled as a worker. 42 U.S.C. § 402(b)(1)(D).

Thus, there would be no reason for Peter to expect or contract for Grace's social security survivor benefits, because none would be available to any person other than their child Sam, or Grace's parents. 42 U.S.C. § 402(d) and (h).

Example (9a): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) individual IRA benefits, (v) a NYS Pension plan benefit, (vi) a FEGLIA benefit, (vii) a Civil Service Retirement ("CSRS") pension benefit, (viii) ERISA life insurance benefit, and (ix) social security benefits. Suppose Wendy and Grace predecease their respective partners.

Spousal Survivor Benefits

Spousal Survivor Benefit Elections

Harry may make a spousal benefit election and begin receiving spousal benefits before Wendy dies after Wendy has applied for her social security benefits. Harry may also make the election after Wendy dies. The starting date for the payments depends on whether the survivor is disabled or taking care of the worker's child or children.

Harry would have no elective estate concerns if he were entitled to spousal survivor social security benefits because the benefits are not included in Wendy's elective estate.

Example (10): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) individual IRA benefits, (v) a NYS Pension plan benefit, (vi) a FEGLIA benefit, (vii) a Civil Service Retirement ("CSRS") pension benefit, (viii) ERISA life insurance benefit, (ix) social security benefits, and (x) ERISA Spousal Survivor Benefit plan benefits.

Family Law Rights and Responsibilities:

ERISA pension plans are essentially pension plans of employers, other than governments, churches, whose participants are not restricted to owner-employees. ERISA Spousal Survivor Benefit Plans are essentially ERISA pension plans other than Top-Hat Plans, SEP Plans and SIMPLE Plans. They are the only ERISA plans required to provide spousal survivor benefits. ERISA preempts any state law that "may now or hereafter relate to any [ERISA] employee benefit plan," other than those explicitly or implicitly excluded.

ERISA Spousal Survivor Benefit Plans are included as a family or spousal asset in determining support obligations for children or an adult partner. These plans may defer to a domestic relations order, if and only if, the order is a qualified domestic relations order ("QDRO"). Such orders require explicit references to the plan, the names and addresses of the participant and the persons benefitting from the order, the amount and duration of the ordered plan benefit payments, that may not be included in a support order. *But cf.*, https://www.nycourts.gov/forms/familycourt/pdfs/4-23.pdf It is not clear whether a support order other than a QDRO may be used to wrest benefit payments from a participant or beneficiary of an ERISA Spousal Survivor Benefit Plan.

F.C.A. Articles 4, 5, 5-B

Form 4-23
(Child Support, Paternity–
Qualified Domestic Relations Order)
8/2010

At a term of the Family Court of the State of New York, held in and for the County of _____at_____ New York, on _____, _____.

PRESENT: Hon. _____
Judge/Support Magistrate

_____

In the Matter of a Proceeding for Support Pursuant to Article _____of the Family Court Act

QUALIFIED DOMESTIC RELATIONS ORDER

Petitioner,

Docket No. _____

S.S.#: xxxx-xx-_____

- against -

Respondent.

S.S.#: xxxx-xx-_____

_____

THIS ORDER IS INTENDED TO CONSTITUTE A QUALIFIED DOMESTIC RELATIONS ORDER WITHIN THE MEANING OF SECTIONS 414(P) AND 401(A)(13) OF THE INTERNAL REVENUE CODE OF 1986 AND SHALL BE ADMINISTERED IN CONFORMITY WITH SUCH PROVISIONS.

An order of support having been entered by the Family Court, _____County, State of New York, whereby (Respondent) (Petitioner) was directed to pay the sum of $_____ per _____ for the support of [specify name(s) of spouse and/or name and social security number(s) of children]: _____ **:** to (Petitioner) (Respondent) (and a further sum of $_____ to be applied to the reduction of arrears until the amount of $_____ in arrears is paid in full); and

And the Court having found that [specify name of the "Participant"]: _____ has a vested interest in retirement benefits and that [specify name of "Alternate Recipient"]: _____ (hereinafter has a right to a portion of said accrued benefits or future accrued benefits payable under a defined benefit pension plan that is qualified under the Internal Revenue Code ("Code") and the Employee Retirement Income Security Act ("ERISA"); and right to a portion of said benefits;

Therefore, it is hereby:

ORDERED that,

1. A portion of the interest of the Participant in the [specify name of

Plan]:_____.
(herein after referred to as the "Plan")shall be assigned to the Alternate Payee, as specified in this Order.

2. Participant information: The name, last-known address, social security number and date of birth of the plan "Participant" are:

Name:

Address:

Last 4 Digits of Soc. Sec. #:

Date of Birth:

The participant 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.

3. Alternate Payee Information: The name, last-known address, social security number, and date of birth of the "Alternate Payee" are:

Name:

Address:

Last 4 Digits of Soc. Sec. #:

Date of Birth:

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. Of the pension amounts otherwise paid to the Participant during his or her lifetime, $_____ of each payment or, if such amount exceeds the amount of the payment to the Participant, the full amount of the Participant's payment, shall be paid to the Alternate Payee. These payments are to begin with the first payment made to the Participant after this Order is submitted to the Plan Administrator.

(4a. Of the pension amounts otherwise paid to the Participant during his or her lifetime, an additional $_____of each payment shall be paid instead to the Alternate Payee until

the arrears of $_____ are paid in full. If such amount exceeds the amount of the payment to the Participant, the full amount of the Participant's payment, shall be paid to the Alternate Payee. These payments are to begin with the first payment made to the Participant after the Order is submitted to the Plan Administrator.) [Delete if inapplicable].

5. No benefit shall be payable under this Order if either the Alternate Payee or the Participant dies before commencement of pension benefits under the Plan.

6. Nothing contained in this Order shall be construed to require any plan, or Plan Administrator to:

A) provide to the Alternate Payee any type, or amount of benefit, or option not otherwise available to the Participant under the plan, or

B) to provide the Alternate Payee increased benefits not available to the Participant, or

C) pay any benefits to the Alternate Payee which are required to be paid to another Alternate Payee under another order issued to the Plan Administrator prior to this Order;

and it is further

ORDERED, that copies of this Order shall be served by (Petitioner) (Attorney for party seeking order) upon the Plan Administrator whose offices are located at [specify address]: _____) who shall:

a) promptly notify counsel, if any, the Participant and the Alternate Payee of the receipt of a copy of this Order; and

b) within a reasonable period of time after receipt of this Order, determine whether the Order is acceptable, and notify counsel, if any, the Participant and the Alternate Payee of such determination;

and it is further

ORDERED, that this Order is deemed appropriate to effectuate the division of the retirement benefits earned by, "the Participant", as a result of (his)(her) participation in the above noted pension plan; and it is further

ORDERED, that this Court retain jurisdiction to implement and supervise the payment of retirement benefits as provided herein should either party or the Plan Administrator make such application, and should the Court determine that it is appropriate and necessary.

DATED:

_____
Judge of the Family Court/Support Magistrate

IF THIS ORDER IS ENTERED BY A JUDGE, PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT, AN APPEAL FROM THIS ORDER MUST BE TAKEN WITHIN 30 DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT, 30 DAYS AFTER SERVICE BY A PARTY OR THE ATTORNEY FOR THE CHILD UPON THE APPELLANT, OR 35 DAYS FROM THE DATE OF MAILING OF THE ORDER TO APPELLANT BY THE CLERK OF COURT, WHICHEVER IS EARLIEST.

IF THIS ORDER IS ENTERED BY A SUPPORT MAGISTRATE, SPECIFIC WRITTEN OBJECTIONS TO THIS ORDER MAY BE FILED WITH THIS COURT WITHIN 30 DAYS OF THE DATE OF THE ORDER WAS RECEIVED IN COURT OR BY PERSONAL SERVICE, OR IF THE ORDER WAS RECEIVED BY MAIL, WITHIN 35 DAYS OF THE MAILING OF THE ORDER.

Check applicable box:

☐ Order mailed on [specify date(s) and to whom mailed]:_____

☐ Order received in court on [specify date(s) and to whom given]:_____

Example (10a): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) individual IRA benefits, (v) a NYS Pension plan benefit, (vi) a FEGLIA benefit, (vii) a Civil Service Retirement ("CSRS") pension benefit, (viii) ERISA life insurance benefit, (ix) social security benefits, and (x) ERISA Spousal Survivor Benefit plan benefits. Suppose Wendy and Grace predecease their respective partners.

Spousal Survivor Benefits

Default Surviving Partner Benefits

There is a statutory obligation for an ERISA plan participant to name the employee's spouse, if any, as the beneficiary of the pension plan. ERISA § 205. Moreover, the spouse must remain as the beneficiary unless the participant's spouse has consented to the participant's waiver of such benefit. ERISA § 205(c). Such consent must be made in writing, which must be preceded by a disclosure notice of the implications of the waiver. Thus, Wendy would need Harry's consent to name Sarah as her beneficiary. Treas. Reg. § 1.417(a)(3)-1. *See, also*, *Hurwitz v. Sher*, 982 F.2d 778, 781 (2d Cir. 1992) (holding that a spouse may not be ordered to comply with prenuptial and waive pension interest after death of participant).

In contrast, Grace could name Bruce as his beneficiary without Peter's consent. Peter could rely on a contract to provide her with such beneficiary rights. However, such contract could not be enforced against the proceeds payable to Bruce. The contract could be enforced only against Grace's probate assets and bank accounts which may not be sufficient to pay the claim.

Example (10a): Suppose each adult in the two families owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) individual IRA benefits, (v) a NYS Pension plan benefit, (vi) a FEGLIA benefit, (vii) a Civil Service Retirement ("CSRS") pension benefit, (viii) ERISA life insurance benefit, (ix) social security benefits, and (x) ERISA Spousal Survivor Benefit plan benefits. Suppose Wendy and Grace predecease their respective partners.

Spousal Survivor Benefits

Spousal Survivor Benefit Elections

Harry makes his benefit election when he decides whether to waive his spousal survivor benefit entitlement. Harry would have no claim if Wendy designated Sarah as her beneficiary because he would have had to approve such a designation for it to be effective.

Harry would have no elective estate concerns if he received the survivor benefit because ERISA retirement benefits are excluded from the elective estate even though they appear to be fully included. N.Y. E. P. T. L. § 5-1.1-A (b)(1)(G). On the other hand, if they were included in the elective estate such benefits may not be excluded from the elective estate if the surviving spouse has waived his benefit because the ERISA waiver standards do not always meet the elective share waiver standards. N.Y. E. P. T. L. § 5-1.1-A (e). This exclusion is implied by *Boggs v. Boggs*, 520 U.S. 833 (1997) (ERISA prevents state community property law from being used to wrest an ERISA retirement benefit from the designated beneficiary).

Basic Divorce Principles

New York domestic relations law now permits a no-fault divorce to be obtained without the need for a prior separation agreement. The parties may simply seek approval of a court of an agreed divorce decree. This was not the case before 2010, when separation agreements, which did not have to be court-approved, were required to precede non-fault divorces. Thus, questions arose about the significance of terms included in separation agreements that were incorporated in divorce decrees even though the provisions were designed to provide interim relief during the separation rather than permanent post-divorce relief. For simplicity all marital dissolutions shall herein be described as divorces.

Contested matrimonial actions begin with automatic restraining orders that prohibit either party from making specified changes in their assets or incurring unreasonable debts without prior approval. Courts resolve contested matrimonial actions by making an equitable distribution of marital assets between the parties, which must take into account the support needs of the parties and their dependents. Under this system a party may be required to transfer the other an ownership interest in specific property, pay the other party cash from specified property, or pay the other party cash from any source. This system was not in place before 1980, when it was far easier to distinguish orders awarding support from those awarding property.

Example (11): Suppose Harry and Wendy want to get divorced and each owns only individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend.

Automatic Freeze during a Contested Matrimonial Action:

During the pendency of the contested matrimonial action neither Harry nor Wendy may, without the consent of the other party in writing, or by order of the court, withdraw any property from their bank accounts "except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this action." N.Y. Dom. Rel. L. § 236 Part B. 2.b(1). However, this provision does not prevent Harry or Wendy from changing the beneficiary of his own payable-on-death bank account. Thus, Wendy could retain or change her beneficiary designation to Sarah during the action.

Example (11): Suppose Harry and Wendy want to get divorced and each owns only individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend.

Default Spousal Beneficiary Changes As a Result of a Divorce

New York law provides that except as provided by a governing instrument (including the divorce decree) a revocable spousal designation on a payable-on-death account is revoked and the default designee treated as the designee. N. Y. E. P. T. L § 5-1.4. Thus, if Wendy had designated Harry as the beneficiary of her payable-on-death bank account, such designation would be revoked and her default designee would become the designee. However, the holder of the funds is not liable if it transfers funds to the former spouse before learning of the divorce, but the former spouse would be liable to the default designee. *Id.* If Wendy wished that Harry remain her designee, she would have to redesignate Harry or provide in the divorce decree that she wished to do so.

Disposition of Assets As a Result of a Divorce

New York law permits any equitable distribution of Harry and Wendy's respective wage and bank income and bank accounts. However, such distribution does not explicitly include a provision for an order to make a designation for the individual payable-on-death bank accounts. The court may, however, wish to do so and thereby permit a party to retain the bank accounts but compel that party to name his dependent the beneficiary to secure a support obligation as in the IRA discussion below.

Example (12): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, and (ii) individual life insurance policies.

Automatic Freeze during a Contested Matrimonial Action:

During the pendency of the contested matrimonial action neither Harry nor Wendy may "change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance" N.Y. Dom. Rel. L. § 236 Part B. 2.b (5). The statute contains no exception for changes with the consent of the other party or by court order, but one suspects both would be permitted. Thus, Wendy could not change her life insurance beneficiary designation during the action.

Default Spousal Beneficiary Changes As a Result of a Divorce

New York law provides that except as provided by a governing instrument (including the divorce decree) a revocable spousal designation on a life insurance policy is revoked and the default designee treated as the designee. N. Y. E. P. T. L § 5-1.4. Thus, if Wendy had designated Harry as her life insurance policy beneficiary, such designation would be revoked and her default designee would become the designee. If Wendy wished that Harry remain her designee, she would have to redesignate Harry or provide in the divorce decree that she wished to do so.

Example (12): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, and (ii) individual life insurance policies.

Disposition of Assets As a Result of a Divorce

In the course making an equitable distribution of Harry and Wendy's income and property the court may "order a party to purchase, maintain or assign a policy of accident insurance or insurance on the life of either spouse, and to designate in the case of life insurance, either spouse or children of the marriage." N.Y. Dom. Rel. L. § 236 Part B. 2.b .8(a). However, such obligation must cease upon the termination of the spouse's duty to provide maintenance, child support or a distributive award. *Id.*

If the court made no such order, Wendy could choose Sarah as her life insurance beneficiary. On the other hand, the court could order Wendy to designate Harry or Sam as long as she was obligated to support either or both of them. However, the court could not order her to maintain such designation after the end of such period or order her to designate Sarah as her life insurance beneficiary.

Example (13): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, and (iii) benefits in a tax-qualified pension plan restricted to owner-employees.

Automatic Freeze during a Contested Matrimonial Action:

During the pendency of the contested matrimonial action neither Harry nor Wendy may, without the consent of the other party in writing, or by order of the court, (1) "dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keogh accounts, or any other pension or retirement account," or (2) request the payment of any plan benefits unless the party is in pay status in which case he may continue to receive such payments. N.Y. Dom. Rel. L. § 236 Part B. 2.b (2). However, there is no restriction on beneficiary changes. Thus, Wendy could change her pension plan beneficiary designation during the action.

Default Spousal Beneficiary Changes As a Result of a Divorce

New York law provides that except as provided by a governing instrument (including the divorce decree) a revocable spousal designation on a pension plan is revoked and the default designee treated as the designee. N. Y. E. P. T. L § 5-1.4. Thus, if Wendy had designated Harry as her pension plan beneficiary, such designation would be revoked and her default designee would become the designee. If Wendy wished that Harry remain her designee, she would have to redesignate Harry or provide in the divorce decree that she wished to do so.

Example (13): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, and (iii) benefits in a tax-qualified pension plan restricted to owner-employees.

Disposition of Assets As a Result of a Divorce

In the course making an equitable distribution of Harry and Wendy's income and property the court may order that one party to distribute an equitable portion of the present value of the pension interest of the first party. *Majauskas v. Majauskas*, 61 N.Y.2d 481, 463 N.E.2d 15 (N.Y. 1984) (holding vested rights in a non-contributory pension plan are marital properties to the extent that they were acquired between the date of the marriage and the commencement of a matrimonial action and setting forth a method for allocating defined benefit pension plan benefits between parties). Thus, the court could order party either to make a payment to the other as part of the equitable distribution or to provide a portion of the party's plan benefit to the other, including a portion of the plan's survivor benefit. To the extent the court makes no such order to Wendy, she would be free to choose Sarah as her plan beneficiary.

Example (14): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, and (iv) benefits in an individual IRA.

Automatic Freeze during a Contested Matrimonial Action:

During the pendency of the contested matrimonial action neither Harry nor Wendy may, without the consent of the other party in writing, or by order of the court, (1) "dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keogh accounts, or any other pension or retirement account," or (2) request the payment of any plan benefits unless the party is in pay status in which case he may continue to receive such payments. N.Y. Dom. Rel. L. § 236 Part B. 2.b (2). However, there is no restriction on beneficiary changes. Thus, Wendy could change her IRA beneficiary designation during the action.

Default Spousal Beneficiary Changes As a Result of a Divorce

New York law provides that except as provided by a governing instrument (including the divorce decree of marital dissolution) a revocable spousal designation on a pension plan is revoked and the default designee treated as the designee. N. Y. E. P. T. L § 5-1.4. Thus, if Wendy had designated Harry as her IRA beneficiary, such designation would be revoked and her default designee would become the designee. If Wendy wished that Harry remain her designee, she would have to redesignate Harry or provide in the divorce decree that she wished to do so.

Example (14): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, and (iv) benefits in an individual IRA.

Disposition of Assets As a Result of a Divorce

In the course making an equitable distribution of Harry and Wendy's income and property the court may order that one party give the other an equitable portion of the first party's IRA. Such an IRA transfer between spouses is not subject to income tax. Code § 408(d)(6). The court may wish to permit a party to retain an IRA but compel that party to name his dependent the IRA beneficiary to secure a support obligation. *See, e.g., Carniol v Carniol*, 306 A.D.2d 366, 762 N.Y.S.2d 619 (App. Div. 2d Dept. 2003) (holding that the Supreme Court providently exercised its discretion in directing the defendant to name the parties' child as the sole beneficiary of his Charles Schwab IRA account and TIAA/CREF annuity and to provide a life insurance policy for the benefit of the plaintiff and the child until the child's emancipation).

Example (15): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) benefits in an individual IRA and (v) a NYS Pension plan benefit.

Automatic Freeze during a Contested Matrimonial Action:

During the pendency of the contested matrimonial action neither Harry nor Wendy may, without the consent of the other party in writing, or by order of the court, (1) "dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keogh accounts, or any other pension or retirement account," or (2) request the payment of any plan benefits unless the party is in pay status in which case he may continue to receive such payments. N.Y. Dom. Rel. L. § 236 Part B. 2.b (2). However, there is no restriction on beneficiary changes. Thus, Wendy could change her pension plan beneficiary designation during the action.

Such orders bind the parties to the divorce, but not government plans that will follow their own withdrawal rules. *See, e.g.*, Divorce and Your Benefits, Frequently Asked Questions-Getting Started, New York State & Local Retirement System, Office of the New York State Comptroller Q &A 4 available at http://www.osc.state.ny.us/retire/members/divorce/faq/getting_started.php (last visited April 10, 2015) (declaring that automatic restraining orders do not restrict the actions of the New York State & Local Retirement System).

Example (15): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) benefits in an individual IRA and (v) a NYS Pension plan benefit.

Default Spousal Beneficiary Changes As a Result of a Divorce

New York law provides that except as provided by a governing instrument (including the divorce decree of marital dissolution) a revocable spousal designation on a pension plan is revoked and the default designee treated as the designee. N. Y. E. P. T. L § 5-1.4. Thus, if Wendy had designated Harry as her pension plan beneficiary, such designation would be revoked and her default designee would become the designee. If Wendy wished that Harry remain her designee, she would have to redesignate Harry or provide in the divorce decree that she wished to do so.

Example (15): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) benefits in an individual IRA and (v) a NYS Pension plan benefit.

Disposition of Assets As a Result of a Divorce

In the course making an equitable distribution of Harry and Wendy's income and property the court may order one party to give the other party an equitable portion of a party's pension plan interest, including the party's lifetime plan payments and survivor benefits. In particular, the court may compel one party to designate the other irrevocably as the party's beneficiary. *See, e.g.*, *Kaplan v. Kaplan*, 82 N.Y.2d 300 (N.Y. 1993) (declaring "Under the Equitable Distribution Law a distribution of property upon dissolution of the marriage now commonly stands in the place of ongoing support payments formerly provided for by a court-ordered alimony award" and holding that an agreement by a participant that was incorporated into a divorce decree to designate a beneficiary of Teachers Retirement System of NYC benefits is enforceable against the System). To the extent the court makes no such order to Wendy, she would be free to choose Sarah as her NYS Pension plan beneficiary following the divorce.

However, no domestic relations provision authorizes a divorce decree to require a benefit from a government plan that is not otherwise provided by the plan. For example the decree may not give the participant's former spouse the right to receive a pension benefit before the participant begins to receive plan benefits. *See, e.g.*, Divorce and Your Benefits, Frequently Asked Questions, Payments to Alternate Payee, New York State & Local Retirement System, Office of the New York State Comptroller Q & A 4 available at http://www.osc.state.ny.us/retire/members/divorce/faq/getting_started.php . It is not clear whether the court may compel a worker to withdraw plan benefits.

Example (16): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) benefits in an individual IRA, (v) a NYS Pension plan benefit, and (vi) a federal life insurance ("FEGLIA") benefit.

Automatic Freeze during a Contested Matrimonial Action:

During the pendency of the contested matrimonial action neither Harry nor Wendy may "change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance" N.Y. Dom. Rel. L. § 236 Part B. 2.b (5). As with local government plans such a restriction will not affect the FEGLIA rules, which will follow the designations made in accord with its rules. Moreover, if Wendy disregarded the order and changed the beneficiary from Harry to Sarah, Harry would not be entitled to wrest the benefit from the former spouse because of Sarah's entitlement under the terms of the FEGLIA plan. Harry would have a claim against Wendy's probate and bank assets.

Default Spousal Beneficiary Changes As a Result of a Divorce

New York law provides that except as provided by a governing instrument (including the divorce decree) a revocable spousal designation on a life insurance policy is revoked and the default designee treated as the designee. N. Y. E. P. T. L § 5-1.4. The FEGLIA beneficiary designation rules preempt this provision. See *Hillman* (holding that FEGLIA preempted a Virginia revocation upon divorce provision).

Example (16): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) benefits in an individual IRA, (v) a NYS Pension plan benefit, and (vi) a federal life insurance ("FEGLIA") benefit.

Disposition of Assets As a Result of a Divorce

In the course making an equitable distribution of Harry and Wendy's income and property the court may order one party to designate either the party's spouse or children of the marriage as irrevocable beneficiaries of a life insurance policy during a period of time fixed by the court. However, the order is only effective for FEGLIA benefits if it specifies the new designee and is received by the appropriate federal office before the participant's death. 5 C.F.R. §§ 870.801 and 802. Moreover, an order of assignment is effective only if the assignment is made on an approved form in the approved manner and is received by the appropriate federal office before the participant's death. 5 C.F.R. §§ 870.901 and 902.

To the extent the court makes no such order to Wendy, she would be free to choose Sarah as her FEGLIA plan beneficiary.

Example (17): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) benefits in an individual IRA, (v) a NYS Pension plan benefit, (vi) a federal life insurance ("FEGLIA") benefit, and (vii) a Civil Service Retirement System ("CSRS") pension benefit.

Automatic Freeze during a Contested Matrimonial Action:

During the pendency of the contested matrimonial action neither Harry nor Wendy may, without the consent of the other party in writing, or by order of the court, (1) "dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keogh accounts, or any other pension or retirement account," or (2) request the payment of any plan benefits unless the party is in pay status in which case he may continue to receive such payments. N.Y. Dom. Rel. L. § 236 Part B. 2.b (2). However, there is no restriction on beneficiary changes. Thus, Wendy could change her CSRS pension plan beneficiary designation during the action.

These court orders do not bind the plan sponsor, whether it is a local or federal government. It is the parties to the matrimonial action, rather than the pension plan sponsor, who may be bound by such an order. Thus, a party to a divorce may obtain a CSRS plan benefit despite such an order. However, it seems likely that since the court could have issued an order granting the benefit to a person other than Wendy prior to its distribution it may do the same after the benefit has been distributed to Wendy.

Example (17): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) benefits in an individual IRA, (v) a NYS Pension plan benefit, (vi) a federal life insurance ("FEGLIA") benefit, and (vii) a Civil Service Retirement System ("CSRS") pension benefit.

Default Spousal Beneficiary Changes As a Result of a Divorce

New York law provides that except as provided by a governing instrument (including the divorce decree) a revocable spousal designation on a pension plan policy is revoked and the default designee treated as the designee. N. Y. E. P. T. L § 5-1.4. The CSRS beneficiary designation rules preempt this provision. See *Hillman* and *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001) (holding that ERISA preempts a state of Washington revocation upon divorce law).

Thus, if Wendy wished that Harry remain her designee after the divorce, she would not have to redesignate Harry or provide in the divorce decree that she wished to do so.

Example (17): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) benefits in an individual IRA, (v) a NYS Pension plan benefit, (vi) a federal life insurance ("FEGLIA") benefit, and (vii) a Civil Service Retirement System ("CSRS") pension benefit.

Disposition of Assets As a Result of a Divorce

In the course making an equitable distribution of Harry and Wendy's income and property the court may order one party to give the other party an equitable portion of a party's pension plan interest, including the party's lifetime plan payments and survivor benefits. However, a court order will only be effective if it is acceptable to the federal government. Acceptable orders are often called Court Orders Acceptable for Processing ("COAPs"). COAPs must expressly reference their compliance with the relevant federal regulations, and provide "clear, specific, and express instructions" about the party's benefit entitlements, and either refer to a portion of the annuity payments being paid to an employee or a portion of the employee's survivor annuities. 5 C. F. R. §§ 838.801-807 (survivor annuities) 5 C. F. R. §§ 838.301-306 (employee annuities). Model language is also presented. 5 C. F. R. 838 Subpart I (§§ 9.101-138) Appendix A. As with NYS pension plan benefits, the order may not require the plan to pay benefits to a person other than the participant unless the participant is also receiving the benefit.

To the extent the court does not Wendy to give Harry her entire CSRS survivor annuity, she would be free to choose Sarah as her CSRS plan survivor annuity beneficiary after the divorce, unless she remarried in which case the new spouse would be entitled to such benefit.

Example (18): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) benefits in an individual IRA, (v) a NYS Pension plan benefit, (vi) a federal life insurance ("FEGLIA") benefit, (vii) a Civil Service Retirement System ("CSRS") pension benefit, and (viii) ERISA life insurance benefit.

Automatic Freeze during a Contested Matrimonial Action:

During the pendency of the contested matrimonial action neither Harry nor Wendy may "change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance" N.Y. Dom. Rel. L. § 236 Part B. 2.b (5). As with local government plans such a restriction will not affect the ERISA rules, which will follow the designations made in accord with its rules. As with FEGLIA it would appear that the order may not be used to wrest the benefits from the new designee. *But see Unicare Life & Health Ins. Co. v. Phanor*, 472 F. Supp. 2d 8 (D. Mass.2007) (an order requiring that a participant refrain from changing an ERISA life insurance designation is effective).

Default Spousal Beneficiary Changes As a Result of a Divorce

N. Y law provides that except as provided by a governing instrument (including the divorce decree) a revocable spousal designation on a life insurance policy is revoked and the default designee treated as the designee. N. Y. E. P. T. L § 5-1.4. The ERISA beneficiary designation rules preempt this provision. *See Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001) (holding that ERISA preempts a state of Washington revocation upon divorce provision). Thus, if Wendy wished that Harry remain her designee after the divorce, she would not have to redesignate Harry or provide in the divorce decree that she wished to do so.

Example (18): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) benefits in an individual IRA, (v) a NYS Pension plan benefit, (vi) a federal life insurance ("FEGLIA") benefit, (vii) a Civil Service Retirement System ("CSRS") pension benefit, and (viii) ERISA life insurance benefit.

Disposition of Assets As a Result of a Divorce

In the course making an equitable distribution of Harry and Wendy's income and property the court may order one party to designate either the party's spouse or children of the marriage as irrevocable beneficiaries of a life insurance policy during a period of time fixed by the court. However, the order is only effective if it complies with the designation rules of the ERISA plan. However, despite the fact that most ERISA life insurance plans do not provide for such deference, the courts have consistently ruled that the plans must comply with orders that specify the new designee. See, e.g., *Metro. Life Ins. Co. v. Bigelow*, 283 F.3d 436 (2d Cir. 2002) (directing an ERISA life insurance plan to pay the decedent's daughters rather than his father who he named contrary to the requirements of a divorce decree)

To the extent the court makes no such order to Wendy, she would be free to choose Sarah as her FEGLIA plan beneficiary.

Example (19): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) benefits in an individual IRA, (v) a NYS Pension plan benefit, (vi) a federal life insurance ("FEGLIA") benefit, (vii) a Civil Service Retirement System ("CSRS") pension benefit, (viii) ERISA life insurance benefit, and (ix) social security benefits.

Automatic Freeze during a Contested Matrimonial Action:

During the pendency of the contested matrimonial action neither Harry nor Wendy may "change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance" N.Y. Dom. Rel. L. § 236 Part B. 2.b (5). This is irrelevant because workers do not choose their social security beneficiaries.

Default Spousal Beneficiary Changes As a Result of a Divorce

New York law provides that except as provided by a governing instrument (including the divorce decree of marital dissolution) a revocable spousal designation on a life insurance policy is revoked and the default designee treated as the designee. N. Y. E. P. T. L § 5-1.4. This is irrelevant because workers do not choose their social security beneficiaries.

Example (19): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) benefits in an individual IRA, (v) a NYS Pension plan benefit, (vi) a federal life insurance ("FEGLIA") benefit, (vii) a Civil Service Retirement System ("CSRS") pension benefit, (viii) ERISA life insurance benefit, and (ix) social security benefits.

Disposition of Assets As a Result of a Divorce

In the course making an equitable distribution of Harry and Wendy's income and property the court does not seem to have any authority to assign social authority benefits under state law except to the extent of support obligations. The social security would preempt any other attempted assignment before or after the distribution of social security benefits. 42 U.S.C. § 407(a).

However, a divorced spouse qualifies for the same spousal lifetime and survivor benefit as a worker's spouse if the divorced spouse (1) was married to the worker for at least 10 years; (2) must be at least age 62; (3) divorced for at least two years; (4) and has not remarried. 42 U. S. C § 402(b). The fourth condition is the traditional limitation on the payment of spousal maintenance to the lifetime of the supporting party.

Example (20): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) benefits in an individual IRA, (v) a NYS Pension plan benefit, (vi) a federal life insurance ("FEGLIA") benefit, (vii) a Civil Service Retirement System ("CSRS") pension benefit, (viii) ERISA life insurance benefit, (ix) social security benefits, and (x) ERISA Spousal Survivor Benefit plan benefits.

Automatic Freeze during a Contested Matrimonial Action:

During the pendency of the contested matrimonial action neither Harry nor Wendy may, without the consent of the other party in writing, or by order of the court, (1) "dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keogh accounts, or any other pension or retirement account," or (2) request the payment of any plan benefits unless the party is in pay status in which case he may continue to receive such payments. N.Y. Dom. Rel. L. § 236 Part B. 2.b (2). However, there is no restriction on beneficiary changes. Thus, Wendy could change her ERISA pension plan beneficiary designation during the action.

These court orders do not bind the plan sponsor, whether it is a government or a private action. It is the parties to the matrimonial action, rather than the pension plan sponsor, who may be bound by such an order. However, it seems likely that since the court could have issued an order granting the benefit to a person other than Wendy prior to its distribution it may do the same after the benefit has been distributed to Wendy.

Example (20): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) benefits in an individual IRA, (v) a NYS Pension plan benefit, (vi) a federal life insurance ("FEGLIA") benefit, (vii) a Civil Service Retirement System ("CSRS") pension benefit, (viii) ERISA life insurance benefit, (ix) social security benefits, and (x) ERISA Spousal Survivor Benefit plan benefits.

Default Spousal Beneficiary Changes As a Result of a Divorce

New York law provides that except as provided by a governing instrument (including the divorce decree) a revocable spousal designation on a pension plan policy is revoked and the default designee treated as the designee. N. Y. E. P. T. L § 5-1.4. The ERISA beneficiary designation rules preempt this provision. *See Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001) (holding that ERISA preempts a state of Washington revocation upon divorce law). There is a question whether ERISA pension plans may include a revocation upon divorce of spousal beneficiary designations.

Example (20): Suppose Harry and Wendy want to get divorced and each owns only (i) individual payable-on-death bank accounts in which they hold their only non-bank net income, namely the wages from a private employer that they don't spend, (ii) individual life insurance policies, (iii) benefits in a tax-qualified pension plan restricted to owner-employees, (iv) benefits in an individual IRA, (v) a NYS Pension plan benefit, (vi) a federal life insurance ("FEGLIA") benefit, (vii) a Civil Service Retirement System ("CSRS") pension benefit, (viii) ERISA life insurance benefit, (ix) social security benefits, and (x) ERISA Spousal Survivor Benefit plan benefits.

Disposition of Assets As a Result of a Divorce

In the course making an equitable distribution of Harry and Wendy's income and property, the court may order one party to give the other party an equitable portion of a party's pension plan interest, including the party's lifetime plan payments and survivor benefits. However, a court order will only be effective if it is a Qualified Domestic Relations Order. Those requirements are very similar to the COAP requirements for federal pension plans, although there is no need to include any regulatory or statutory citations. In both cases there is a need for "clear, specific, and express instructions" about the plan, the plan participant, the person benefitting from the order, and the benefit entitlements to be transferred.

A QDRO differs in two significant ways from the COAP orders, the domestic relations orders that may govern FEGLIA benefits, and the domestic relations orders that govern state government plan benefits.

First, a QDRO is treated as a plan term that establishes a beneficiary relation between the payee of the order and the ERISA plan without the need for any action by the payee. ERISA § 206(d)(3)(J) A QDRO is not a garnishment order or a direction for a plan to make a benefit payment. Rather the order establishes a benefit entitlement.

Second, because a QDRO is treated as a plan term it may require a plan make benefit payments even when the participant is not receiving any payments. On the other hand there are limitations on the terms changes that a QDRO may make. For example, the benefit may only be paid in a form that the participant could have selected (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse)

There is uncertainty about how ERISA plans must respond to domestic relations orders.

1) To what extent does an order need to comply with statutory requirements to be a QDRO?
2) How can one obtain the information needed to generate a QDRO?
3) Are orders that are not directed at plans but requiring participants to take or refrain from actions QDROs?
4) May a domestic relations order that is not a QDRO be used to wrest benefits from a plan participant or beneficiary?
5) Do QDROs govern plans which are not Spousal Survivor Benefit Plans?
6) If the QDRO rules do not govern ERISA plans that are not Spousal Survivor Benefit Plans, are they any limits on the effects of domestic relations orders of other ERISA plans?