

**2010 ERISA Advisory Council  
Disparities for Women and Minorities in Retirement and Health Care  
Outline for Testimony of Elizabeth M. Wells<sup>1</sup>  
September 1, 2010**

**ALLOCATING RETIREMENT BENEFITS TO DIVORCING/DIVORCED WOMEN  
FREQUENTLY ENCOUNTERED PROBLEMS**

- 1) Obtaining information on spouse's/former spouse's retirement plans (what plans, descriptive information, value, QDRO procedures<sup>2</sup>)**
  - a) General Problem:** Throughout US retirement benefits attributable to marital years considered marital property. Often Ws have little or no knowledge regarding H's retirement benefits.
  - b) Current Methods:** Whereby W may obtain H retirement plan information
    - (1) W find from H
      - (a) H not know
      - (b) H not provide information/full information
    - (2) W Contact Plan Sponsor
      - (a) Not know name/address of entity where H earned benefits
        - (i) Entity known by other name
        - (ii) Entity acquired by another entity
        - (iii) Entity no longer exists
      - (b) Entity not comply/fully comply with written request despite DOL guidance that must comply
        - (i) Voluminous documents, many irrelevant
        - (ii) No documents
        - (iii) Incomplete/missing/misleading documents
        - (iv) No documents on predecessor plans and transitions re same (e.g., banking conglomerates)
    - (3) W retain attorney. Attorney issue subpoena.
      - (a) Not know name/address of entity where H earned benefits
        - (i) Entity known by other name
        - (ii) Entity acquired by another entity

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<sup>1</sup> Elizabeth M. Wells is an attorney in Chicago, Illinois who since 1997 has concentrated her full-time legal practice on the allocation of retirement benefits in marital separation and dissolution matters. She works with divorced and divorcing individuals, separated and separating individuals, divorce (domestic relations) attorneys and other attorneys and professionals to identify and analyze the retirement benefits at issue, to determine the options for allocating those benefits, and to identify, develop and implement legal strategies based upon those benefits. Elizabeth has authored and been quoted in many articles relating to her area of practice. She frequently speaks to groups of attorneys and other professionals regarding retirement plan allocations. She has served as a visiting professor for various classes offered by Illinois law schools. Elizabeth has held several leadership positions in local and state bar associations, and has served on the Boards of various organizations including the Chicago Bar Association and the John Marshall Law School Employee Benefits Advisory Board. Ms. Wells received her B. A. Summa cum laude from Hamline University in 1977, and her J. D. from Chicago-Kent College of Law in 1995. She has been included in several editions of Marquis Who's Who.

<sup>2</sup> Under ERISA, the legal document that allows for the allocation of a participant's retirement benefits to an individual other than the participant ("alternate payee") is called a Qualified Domestic Relations Order or QDRO. State courts issue orders called Domestic Relations Orders ("DROs"). Once a DRO is approved (qualified) by the plan at issue, it is considered to be a *Qualified* Domestic Relations Order.

- (iii) Entity no longer exists
- (b) Entity not comply/fully comply with subpoena despite DOL guidance that must comply
  - (i) Voluminous documents, many irrelevant
  - (ii) No documents
  - (iii) Incomplete/missing/misleading documents
  - (iv) No documents on predecessor plans and transitions re same (e.g., banking conglomerates)
- (c) Attorney not know what to request/what entitled to request
- (d) Attorney fees increase with time spent. If Plan uncooperative, much time can be spent.
- (e) Divorce occurs in state court. Current ERISA solution for lack of production is action in federal court. Minimal cost of \$5,000 for bringing suit against plan in federal court for lack of compliance with subpoena. Costs easily run to \$10,000 or more. No guarantee that Plan will be required to pay.

**c) Possible Solutions<sup>3</sup>**

- (1) When participant married, mandate that Plan Sponsor require spousal acknowledgment of plan information received (e.g., account statements, plan descriptions)
- (2) When participant married in DC Plan (or in Cash Balance Plan), mandate spousal consent for
  - (a) Loan
  - (b) Withdrawal
  - (c) Transfer
  - (d) Distribution
- (3) Mandate that all firms that sponsor plans provide on firm website contact information to obtain information on plans for divorcing spouses. Said contact information to include *name, mailing address and telephone number of individual* to call with to follow up on obtaining information.
- (4) Plans to keep information on predecessor plans to disseminate to participant and beneficiaries (e.g., potential alternate payees). Such information to include, e.g., Plan Document, SPD, participant last statement of benefits, documents regarding transition to successor plan.
- (5) Mandate that if plan sponsor receives communication from party not represented by counsel who is seeking share of retirement benefits as a result of divorce that person to receive:
  - (a) Name, address, phone # of local DOL office
  - (b) Document stating that information and advice regarding retirement benefits received from Plan may not be objective, that significant monies may be involved, that individual has right to contact DOL and/or attorney to assist with process.
- (6) When plan sponsor (administrator) receives written confirmation that divorce in progress (e.g., Court stamped document indicating that divorce filed, Court Order stating divorce in progress and retirement plans at issue), plan must

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<sup>3</sup> “Possible Solutions” used in this outline are intended as starting points of discussion. Other solutions or variations on these solutions may prove more effective and/or workable.

then provide key information on Plan and participant's interest in plan. Could be DOL form noting information to be provided:

- (a) For DB Plan might include name of plan, current SPD, date began participation, date(s) upon which participant ceased accruing benefits, date(s) upon which participant resumed accruing benefits, total amount of credited service to date, relevant recent salary information, QDRO procedures, etc.
  - (b) For DC Plan might include name of plan, current SPD, most recent account statement, date began participation, amounts loaned, withdrawn, distributed and dates of same, QDRO procedures, etc.
  - (c) Also plan to provide address to write to obtain additional information (e.g. plan documents, specific questions)
- (7) DOL to outline procedures for divorcing spouse (or attorney) to prove that a) individual contacted plan in writing requesting information, b) 30 days have passed and Plan not respond. If proof met, DOL to write to Plan to specifically request information be forwarded on DOL request. If Plan not immediately comply, DOL to fine Plan under ERISA 502(c)(6).<sup>4</sup>

## 2) Obtaining approval of Domestic Relations Orders (DROs) dividing retirement benefits

a) **General Problem:** DOL guidelines state that any Court Order is a QDRO if it meets certain criteria. Plan reviewers sometimes mandate language prohibited under DOL guidelines. Plans sometimes attempt to mandate their form QDROs. Forms can deprive Alternate Payee of significant benefits<sup>5</sup>. Some plans refuse to review QDRO drafts.

### b) Current Methods:

- (1) If Plan refuses to accept anything other than QDRO form, only official recourse is suit in federal court. Minimum of \$5,000 to bring such suit.
- (2) If Plan refuses to accept QDRO based on criteria in direct conflict with law or DOL guidance (e.g., refusing to accept QDRO because QDRO provides W with part of benefit earned after date of divorce), only official recourse is suit in federal court. Minimum of \$5,000 to bring such suit.
- (3) For plans that refuse to review DRO drafts,
  - (a) Draft QDRO (if form, based on form but with changes)
  - (b) If possible, obtain agreement from H (H's attorney)
  - (c) If agreement, Court enters DRO.
  - (d) If no agreement, litigate (time and money), court decides how DRO reads, court enters DRO.
  - (e) Plan may not review DRO for several months

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<sup>4</sup> Revising statutory provisions could render collection of fines more lucrative for DOL.

<sup>5</sup> **Example #A:** H has DP benefit. P is 15 years older than AP. Federal regulations state "shared benefit" must be offered; "separate benefit" optional. Form calls for "separate benefit" (based on life of AP). Under form ("separate interest") QDRO W receives \$A starting on certain date for life. Under custom ("shared interest") QDRO, W receives 8 X \$A starting on same date for life.

**Example #B:** H has interest in traditional DB Plan. Parties divorced at H at 55. H early retirement age 60. Reduced by percentage per year. H entitled to unreduced benefit if commence at age 65. Plan QDRO form drafted so that W to receive present value of benefit based on benefit calculated as of H's age 55 assuming H commenced benefit as of H's age 55 (thus discounted benefit over 10 year period). Plan QDRO form further reduces W's benefit if W younger than H. Parties intend that W to receive 50% of Marital Portion of H's benefit before reductions for W's age. Although form QDRO states that W receives 50% of Marital Portion, under Plan's form QDRO, W actually receives approximately 20% of Marital Portion (before reductions for W's age).

- (f) Once Plan reviews, may decide is problem with DRO.
  - (g) If Plan provide individual to contact, then contact individual to clarify problem and solve. Then repeat steps (a), (b), (c) (d) and (e).
  - (h) If Plan not provide individual to contact, then repeat steps (a), (b), (c) (d) (e)and (f) until strike upon solution
  - (i) Steps represent attorney time, and potential arguments between spouses (former spouses) translating to further attorney time
- (4) For plans that review DRO drafts:
- (a) Draft DRO (if form, based on form but with changes)
  - (b) If possible, obtain agreement from H (H's attorney) on DRO draft
  - (c) Submit DRO draft to plan
  - (d) If plan preliminarily approves draft, then Court enters DRO.
  - (e) If plan not preliminarily approve draft, then work with Plan and/or H (H's attorney) to find acceptable solution
  - (f) Preliminarily approved DRO usually reviewed by Plan quickly.
  - (g) Plan reviewing DRO drafts (not insisting on DROs) saves parties time and money.
- (5) If Plan QDRO review process not provide name of individual to contact during DRO approval process:
- (a) Unnamed Plan Administrator representative #1 reviews DRO and raises issues.
  - (b) W's attorney attempts to resolve problems communicated by unnamed Plan Administrator representative #1 and resubmits DRO
  - (c) Unnamed Plan Administrator representative #2 raises additional issues with DRO not previously raised. W's attorney attempts to resolve these issues and resubmits DRO
  - (d) Unnamed Plan Administrator representative #3 raises additional issues with DRO not previously raised....

**c) Possible Solutions**

- (1) DOL mandate that QDRO procedures allow for review of draft QDROs
- (2) DOL mandate that as part of QDRO procedures, after DRO draft or DRO has been submitted to Plan for approval and Plan has refused to approve DRO draft or DRO, then Plan to provide to individual (or attorney) submitting DRO draft or DRO the full name, mailing address, and telephone number of individual who reviewed DRO draft or DRO (to encourage communications and expedite approval).
- (3) DOL to mandate that as part of QDRO procedures, any QDRO or series of QDROs on any case be reviewed by one individual, or if reviewed by a series of individuals, that all such individuals comments be consistent with previous reviewers.
- (4) DOL mandate that as a part of QDRO procedures, other than providing a copy of their QDRO form, QDRO reviewers refrain from repeated comments encouraging use of said QDRO form.
- (5) DOL outline procedures whereby a divorcing spouse (or attorney) may prove that a) DOL procedures state that certain things prohibited (e.g., mandating QDRO forms), b) Plan states in writing something contrary to DOL guidelines (e.g., QDRO forms are mandated) c) divorcing spouse (attorney) has written plan to object to plan's policy and d) 30 days has passed since writing

objecting to policy with no response from Plan. If proof met, DOL to write Plan to raise issue of policies contrary to DOL policy.

**3) Payment of benefits when Participant's status in the plan changes.**

**a) DC Plan General Problem:** During or after divorce, and before QDRO entered and approved, H takes loan, hardship withdrawal or distribution from plan (via transfer or some other method)

**b) DC Plan Current Method**

(1) W (or attorney) draft, enter and submit QDRO to Plan before finding that monies have been borrowed/withdrawn/distributed

(2) W incurs significant time with attorneys (and significant fees) to attempt to obtain monies from other sources that should have come from Plan

**c) DC Plan Potential Solutions**

(1) DOL to create form Order. Order states

(a) Before divorce final

(i) This Order shall remain effective until [date] or entry of the Court Order finalizing the parties' divorce, whichever shall be the latest to occur. This Order may be extended beyond said date only by Court Order

(ii) P is in process of divorce

(iii) P has interest in XYZ DC Plan

(iv) Court may find (has found) that all or portion of Plan is marital property and may issue a QDRO

(v) The Plan shall within ten business days of receiving this Order forward to P's former spouse (or attorney) the following information (including, but not limited to account statement showing P's balance as of the most recent date available and all documentation showing any amounts borrowed, withdrawn or distributed to P or on P's behalf from the XYZ plan since the date divorce case was filed).

(vi) During the time this Order is effective P shall receive no monies from XYZ Plan (loans, withdrawals or distributions) unless and until the court issues an order allowing P to receive all or a portion of monies.

(vii) Upon the day after the expiration date of this Order, if the plan has received no court order extending this Order and no court order allowing P to receive all or a portion, then nothing in this Order shall prevent P from receiving any monies from XYZ DC Plan.

(b) After divorce final

(i) P was divorced on [date].

(ii) This Order shall remain effective until [date]. This Order may be extended beyond said date only by Court Order.

(iii) It is believed that P has an interest in XYZ DC Plan

(iv) The Court has found that all or a portion of the plan is marital property and expects that a QDRO will be issued.

(v) The Plan shall within ten business days of receiving this Order forward to P's former spouse (or attorney) the following information (including, but not limited to account statement

showing P's balance as of the most recent date available and all documentation showing any amounts borrowed, withdrawn or distributed to P or on P's behalf from the XYZ plan since the date of divorce).

(vi) During the time this Order is effective,

1. P shall receive no monies from XYZ Plan (loans, withdrawals or distributions) unless and until the plan receives a copy of a court order allowing P to receive all or a portion of monies.
2. If P makes any change to P's designated beneficiary on XYZ Plan, the Plan shall within five business days of such change, forward documents to P's former spouse (or attorney) evidencing such change.
3. If P dies and upon P's death P's former spouse is not named as P's beneficiary, the Plan shall forward to P's former spouse (or attorney) copies of all communications with P's then existing beneficiary within five business days of any such communication being made.

(vii) Upon the day after the expiration date of this Order, if the plan has received no court order extending this Order, and no Domestic Relations Order providing for P's former spouse to receive a portion of Plan benefits, then nothing in this Order shall prevent P from receiving monies from XYZ DC Plan.

(2) If Plan receives such Order, Plan must comply.

**d) DB Plan General Problem:** After divorce and before QDRO entered and approved, 1) P as a single person commences benefits; 2) P as a person married to a subsequent spouse dies before commencing benefits; or 3) P as a person married to a subsequent spouse commences benefits, any QDRO entered regarding P's former spouse may provide benefits to the former spouse only during P's lifetime.

**e) DB Plan Current Method:** Mixed results depending upon court decisions in specific jurisdiction

**f) DB Plan Possible Solutions:**

(1) DOL to create form order to be used when/after divorce is finalized. Order to state:

(a) Before divorce final

(i) This Order shall remain effective until [date] or entry of the Court Order finalizing the parties' divorce, whichever shall be the latest to occur. This Order may be extended beyond said date only by Court Order

(ii) P is in process of divorce

(iii) P has interest in XYZ DB Plan

(iv) Court may find (has found) that all or portion of Plan is marital property and may issue a QDRO

(v) The Plan shall within ten business days of receiving this Order forward to P's former spouse (or attorney) the following information (including, but not limited to including, but not limited to statement of benefit showing P's balance (if any) and

accrued benefit as of the most recent date available and all documentation showing any amounts borrowed, withdrawn or distributed to P or on P's behalf from the XYZ DB plan since the date divorce was filed, P's current beneficiary(ies)

- (vi) During the time this Order is effective P shall receive no monies from XYZ DB Plan (loans, withdrawals or distributions) unless and until the court issues an order allowing P to receive all or a portion of monies.
- (vii) Upon the day after the expiration date of this Order, if the plan has received no court order extending this order, and no Domestic Relations Order providing for P's former spouse to receive a portion of Plan benefits, then nothing in this Order shall prevent P from receiving monies from XYZ DB Plan.

(b) After divorce final

- (i) P was divorced on [date].
- (ii) This Order shall remain effective until [date]. This Order may be extended beyond said date only by Court Order.
- (iii) It is believed that P has an interest in XYZ DB Plan.
- (iv) The Court has found that all or a portion of the plan is marital property and expects that a QDRO will be issued.
- (v) The Plan shall within ten business days of receiving this Order forward to P's former spouse (or attorney) the following information (including, but not limited to statement of benefit showing P's balance (if any) and accrued benefit as of the most recent date available and all documentation showing any amounts borrowed, withdrawn or distributed to P or on P's behalf from the XYZ DB plan since the date of divorce, P's current beneficiary(ies)).
- (vi) During the time this Order is effective
  1. P shall receive no monies from XYZ DB Plan (loans, withdrawals or distributions) unless and until the plan receives a copy of a court order allowing P to receive all or a portion of monies.
  2. If P makes any change to P's designated beneficiary on XYZ DB Plan, the Plan shall within ten business days of such change, forward documents to P's former spouse (or attorney) evidencing such change.
  3. Within ten business days of receiving notice of P's marriage, the Plan shall forward to P's former spouse (or attorney) documents showing the name of P's spouse.
  4. Within ten business days of receiving notice of P's death, the Plan shall forward to P's former spouse (or attorney) said notice.

- (c) Upon the day after the expiration date of this Order, if the Plan has received no court order extending this order, and no Domestic Relations Order providing for P's former spouse to receive a portion of Plan benefits, then nothing in this Order shall prevent P from receiving monies from XYZ DB Plan.

(2) If Plan receives such Order, Plan must comply

**4) Obtaining benefits for divorcing/divorced spouses from plans that are not mandated to accept QDROs**

**a) General Problem:** Under current law, non-qualified plans (including but not limited to 403(b) plans, 457(b) plans and executive plans) may (but are not mandated to) accept QDROs.

**b) Current Method**

(1) When one of these plans does accept QDROs, it is not clear if specific aspects of ERISA law can be applied (e.g., in a supplemental executive plan, must the plan administrator provide the plan description or account statements to the Alternate Payee upon request? Must the plan administrator review a DRO submitted “within a reasonable time”?)

(2) Results in divorce situations become very random when some plans accept QDROs (e.g., the City of Chicago 457 plan), and other very similar plans (e.g., the Cook County Illinois 457 plan), do not accept QDROs.

(3) When these plans do not accept QDROs, the parties may experience difficulties (ranging from annoying problems to disasters) in dividing their marital property.<sup>6</sup>

**c) Possible Solutions:**

(1) Change the Code and ERISA to mandate that all retirement plans that provide for tax incentives, deferments, or exemptions for plan sponsors and/or participants accept QDROs and conform to QDRO regulations and guidelines.

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<sup>6</sup> **Example C:** H and W married 25 years. 2 children. W homemaker. H will receive approximately \$3,000 per month via frozen qualified DB Plan at age 55. H has interest in executive supplemental DB plans projected to provide him with over \$30,000 per month of benefits starting at age 55 and continuing for life. Executive plans do not accept QDROs. Present value of executive plans over \$5,000,000. Parties total assets outside of qualified and executive plans approximately \$1,000,000. Problems ensuring that W receives her share of executive DB plans when H retires.

**Example D:** H has interest in Cook County 457 plan (no QDROs allowed) worth approximately \$100,000. Parties have no other assets. Problems ensuring that W receives her share of 457 Plan.