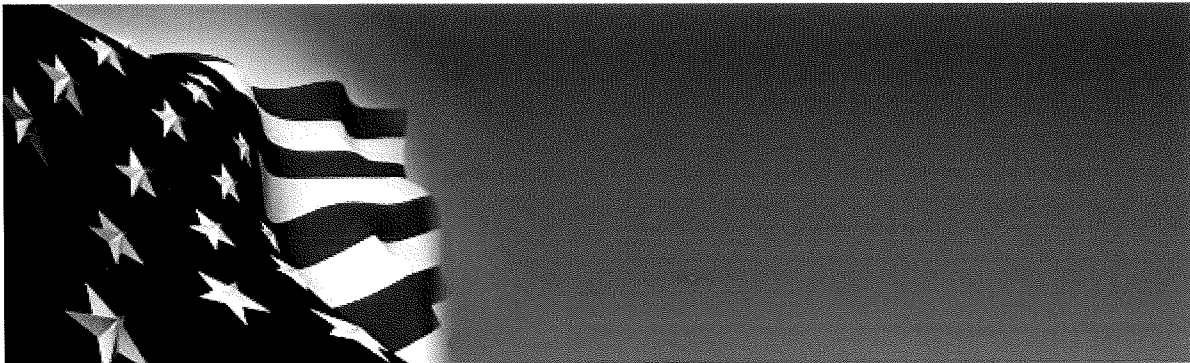


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CYPEN & CYPEN NEWSLETTER for JUNE 4, 2015

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Stephen H. Cypen, Esq., Editor

Never Forget September 11, 2001

and

Always Remember May 2, 2011

1. A LITTLE REFRESHER COURSE ON QDROS AND GOVERNMENTAL PLANS: Hardly a week goes by now without a governmental pension plan being served with a Qualified Domestic Relations Order (QDRO). [1] As a rule, the QDRO purports to direct payment of a portion of the retiree's pension benefits to his or her spouse as part of a plan for equitable distribution of the parties' marital assets. What to do?

Simply put, do nothing -- other than advise the party for whose benefit the QDRO was obtained (or the attorney who obtained it) that the QDRO cannot be enforced against a governmental plan which contains an anti-alienation clause. [2] Believe it or not, this whole rush-to-QDRO began because of misinterpretation of Federal law, which by its own terms, does not apply to governmental plans. In 1974, Congress passed the Employee Retirement Income Security Act

(ERISA), to protect the interests of participants in employee benefit plans. ERISA expressly excludes from coverage governmental plans (including plans established or maintained by a political subdivision of a State). Originally, ERISA required that all pension plans to which it applied provide that benefits could not be assigned or alienated in any circumstances. However, by adoption of the Retirement Equity Act of 1984 (REA), Congress amended ERISA to permit assignment or alienation of benefits when (and only when) a QDRO has been entered. So far so good.

Maybe not, because after 1984, many people (including seasoned attorneys) argued that REA authorized QDROs as to governmental plans. Clearly, there was a wholesale misreading of Federal law; Congress had, for the first time, merely permitted QDROs to be enforced against ERISA (private) plans.

Another argument was advanced in favor of enforcement of QDROs against governmental plans in Florida: that, irrespective of Federal law, pre-existing anti-alienation clauses have been impliedly repealed by subsequent adoption of general law.^[3]

First, there is Section 222.21, Florida Statutes, adopted in 1987. In relevant part the statute merely provides that, while sums payable to a debtor from an ERISA-qualified plan are generally exempt from creditors' claims, they are not exempt from the claims of an alternate payee^[4] under a QDRO. Nothing in Section 222.21, Florida Statutes, is so irreconcilable with an anti-alienation clause as to manifest a clear legislative intent to repeal same.^[5]

Second, there is Section 61.075, Florida Statutes. But the statute merely provides that all interest in retirement or pension plans (whether vested or not) which accrue during the marriage are marital assets subject to equitable distribution. The statute says nothing about whether a court may require that payment of any portion of such an interest equitably distributed to the non-participant spouse be made by the retirement or pension plan to the non-participant spouse. Again, the statute does not manifest a clear legislative intent to repeal an anti-alienation clause.^[6]

Finally, there is Section 61.1301, Florida Statutes, which addresses

the use of Income Deduction Orders as a means of collecting sums due on account of orders entered in domestic relations litigation. At first blush, one might think that an Income Deduction Order could serve as a vehicle for enforcement of a QDRO.^[7]

However, Section 61.1301, Florida Statutes, is expressly limited in its application to collection of alimony and child support. On the other hand, a QDRO is not for collection of either alimony or child support, but, rather, for the purpose of effectuating a plan for equitable distribution of marital assets. Thus, although a so-called QDRO might be enforceable as an Income Deduction Order under Section 61.1301, Florida Statutes, if it is for collection of either alimony or child support, it cannot be used to force direct payment to another of a retiree's pension benefits in order to achieve an equitable distribution of the parties' marital assets.

We have been berated by attorneys who represent spouses and who have either negotiated a marital settlement agreement, or tried a dissolution of marriage case, resulting in an unenforceable QDRO. Regardless, we have consistently been advising our governmental pension clients not to honor QDROs which seek to force direct payment in order to achieve equitable distribution. There is clear Florida appellate authority to sustain this position. In an extremely well reasoned opinion, the First District Court of Appeal discussed all of the above arguments and correctly rejected them, holding that a trial court lacked the power to order a governmental pension plan to pay to one former spouse a portion of the other former spouse's retirement pension benefits as part of a plan for equitable distribution of marital assets. *Board of Pension Trustees of the City General Employees Pension Plan, City of Jacksonville, Florida, Pension Plan Administrator v. Vizcaino*, 635 So.2d 1012 (Fla. 1st DCA 1994). The *Vizcaino* decision has been followed or cited with approval by the Second, Third and Fifth District Courts of Appeal. See *Board of Trustees of the Orlando Police Pension Plan v. Langford*, 833 So.2d 230 (Fla. 5th DCA 2002); *Edwards v. Edwards*, 819 So.2d 837 (Fla. 2d DCA 2002); *Motil v. Motil*, 771 So. 2d 1251 (Fla. 2d DCA 2000); and *Silversmith v. Silversmith*, 797 So.2d 653 (Fla. 3d DCA 2001).

[1] See prior insertion in [C & C Newsletter for May 9, 2013, Item 1](#).

[2] Basically, an anti-alienation clause provides that pensions are

not assignable or subject to any legal process. Most public plans, firefighter and police officer included, contain such clauses. In addition, anti-alienation provisions can be found in State law: Section 175.241, Florida Statutes (firefighters), and Section 185.25, Florida Statutes (police officers). These clauses are applicable to all funds created under said Chapters ("local law" as well as "chapter"), regardless of whether or not the plan itself contains an anti-alienation clause.

[3] In Florida, a Special Act of the Legislature may be impliedly repealed by a subsequent General Act when the latter either is a complete revision of the entire subject or so irreconcilable with the Special Act as to manifest a clear legislative intent to do so. Firefighter and Police Officer Plans can be created by Special Act of the Legislature or by ordinance. Since an ordinance is inferior to any Act of the Legislature, those plans created by ordinance may only be protected by "175.241 and 185.25, Florida Statutes, as referred to in note 2 above.

[4] Under REA, an "alternate payee" is the one for whose benefit a QDRO is entered and to whom direct payment is to be made.

[5] The Florida Retirement System (FRS) contains an anti-alienation clause virtually identical to the ones in Chapters 175 and 185, Florida Statutes. See Section 121.131, Florida Statutes. Nevertheless, the author has been advised that FRS routinely honors QDROs, under the theory that it is easier to pay than to fight. In fact, we believe that the Florida Legislature adopted Section 222.21, Florida Statutes, at the behest of FRS in order to provide FRS with something to hang its hat on.

[6] Section 61.076, Florida Statutes, reiterates that all interest in retirement or pension plans (whether vested or not) which accrue during the marriage are marital assets subject to equitable distribution. The statute then sets forth the procedure to be followed by the court when a military pension is involved.

[7] Remember that Section 61.1301, Florida Statutes, was held by the Supreme Court of Florida to be irreconcilable with, and, therefore, to repeal, an anti-alienation clause contained in a municipal police officers' and firefighters' pension plan created by Special Act of the Legislature. *Alvarez v. Board of Trustees*, 580 So.2d 151 (Fla. 1991).

2. FPPTA 31ST ANNUAL CONFERENCE: The Florida Public Pension Trustees Association's 31st Annual Conference will take

place on June 28 through July 1, 2015 at the Boca Raton Resort & Club, Boca Raton. A link on FPPTA's web site, www.fppta.org, will take you to the Boca Raton Resort & Club site to make your room reservations. You may access information and updates about the Conference at FPPTA's website. All police officer and firefighter plan participants, board of trustee members, plan sponsors and anyone interested in the administration and operation of the Chapters 175 and 185 pension plans should take advantage of this conference.

3. APHORISMS: Be careful about reading the fine print there is no way you are going to like it.

4. TODAY IN HISTORY: In 1907, automatic washer and dryer introduced.

5. KEEP THOSE CARDS AND LETTERS COMING: Several readers regularly supply us with suggestions or tips for newsletter items. Please feel free to send us or point us to matters you think would be of interest to our readers. Subject to editorial discretion, we may print them. Rest assured that we will not publish any names as referring sources.

6. PLEASE SHARE OUR NEWSLETTER: Our newsletter readership is not limited to the number of people who choose to enter a free subscription. Many pension board administrators provide hard copies in their meeting agenda. Other administrators forward the newsletter electronically to trustees. In any event, please tell those you feel may be interested that they can subscribe to their own free copy of the newsletter at <http://www.cypen.com/subscribe.htm>.

7. REMEMBER, YOU CAN NEVER OUTLIVE YOUR DEFINED RETIREMENT BENEFIT.

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