

1986

# Judith A. Koerpel v. Barry Jon Koerpel : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Robert A. Echard; Attorney for Respondent

Ronald E. Nehring, Robert G. Wing; Prince, Yeates & Geldzahler; Attorneys for Appellant.

---

## Recommended Citation

Brief of Appellant, *Koerpel v. Koerpel*, No. 860194.00 (Utah Supreme Court, 1986).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/1069](https://digitalcommons.law.byu.edu/byu_sc1/1069)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

BRIEF

UTAH

DOCKET NO.

KPU

50

.A:

DOCKET NO.

860194-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

JUDITH A. KOERPEL,

Plaintiff-Respondent,

vs.

BARRY JON KOERPEL, M.D.,

Defendant-Appellant.

:  
:  
:  
:  
:  
:  
:  
:  
:  
:

Case No. 860240

Category No. 7

860194-CA

BRIEF OF APPELLANT

Appeal from the Second Judicial District Court  
of Weber County  
The Honorable David E. Roth, District Court Judge

Ronald E. Nehring  
Robert G. Wing  
PRINCE, YEATES & GELDZAHLER  
Third Floor MONY Plaza  
424 East Fifth South  
Salt Lake City, Utah 84111  
Attorneys for Appellant

Robert A. Echard  
635 - 25th Street  
Ogden, Utah 84401  
Attorney for Respondent

FILED

AUG 29 1986

IN THE SUPREME COURT OF THE STATE OF UTAH

---

JUDITH A. KOERPEL,	:	
	:	
Plaintiff-Respondent,	:	
	:	
vs.	:	Case No. 860240
	:	
BARRY JON KOERPEL, M.D.,	:	Category No. 7
	:	
Defendant-Appellant.	:	

---

BRIEF OF APPELLANT

---

Appeal from the Second Judicial District Court  
of Weber County  
The Honorable David E. Roth, District Court Judge

Ronald E. Nehring  
Robert G. Wing  
PRINCE, YEATES & GELDZAHLER  
Third Floor MONY Plaza  
424 East Fifth South  
Salt Lake City, Utah 84111  
Attorneys for Appellant

Robert A. Echard  
635 - 25th Street  
Ogden, Utah 84401  
Attorney for Respondent

## TABLE OF CONTENTS

Table of Authorities	i
Statement of Issues Presented for Review	1
Statement of Facts	1
Summary of Arguments	5
Argument	7
I. The 1984 Amendments To ERISA Prohibit The Enforcement Of State Court Orders Which Require Alienation Of Retirement Plans In A Manner Inconsistent With The Act. Accordingly, The District Court's Order That Dr. Koerpel's Plan Be Terminated Is Unenforceable	7
II. The Court Abused Its Discretion In Awarding Custody of Joshua John Koerpel and Bardin Blake Koerpel to Mrs. Koerpel	10
III. The District Court Erred By Inequitably Assigning All Business Liabilities to Dr. Koerpel	14
Conclusion	17
Appendix	

## TABLE OF AUTHORITIES

### STATUTES

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1056(d). This Section is reproduced in the Appendix to this Appeal pursuant to Rule 24(f), Utah Rules of Appellate Procedure.

### CASE LAW

Berry v. Berry, 635 P.2d 68 (Utah 1981)

Biles v. Biles, 163 N.J. Super. 49 (1978)

English v. English, 565 P.2d 409 (Utah 1977)

In re Marriage of Albert, 85 Cal. App. 3d 900 (1978)

Pusey v. Pusey, No. 20365 (Utah, August 18, 1986)

Williams v. Williams, 163 Cal. App. 3d 793 (1985)

6540g

#### STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in ordering Dr. Koerpel to terminate and distribute the copies of the Defined Benefit Pension Plan ("the Plan") to Mrs. Koerpel?
2. Did the District Court err in awarding custody of Joshua John Koerpel and Bardin Blake Koerpel to Mrs. Koerpel?
3. Did the District Court abuse its discretion in finding that Dr. Koerpel was the moving force behind all business ventures with which he and Mrs. Koerpel were associated and that, consequently, Dr. Koerpel should inherit all business assets and business liabilities?

#### STATEMENT OF FACTS

Dr. Barry J. Koerpel appeals the Findings of Fact, Conclusions of Law and Decree of Divorce entered by the Honorable David Roth, Judge of the Second Judicial District Court, in a divorce action. The relevant facts pertaining to each of the issues identified in the Argument Section of this Brief are as follows:

A. Facts relevant to Dr. Koerpel's claim that the Court improperly ordered him to terminate the Defined Benefit Pension Plan of his professional corporation and distribute its corpus to Mrs. Koerpel:

1. The Barry J. Koerpel, M.D., Professional Corporation is a corporation duly organized under the laws of the State of Utah. (Supplemental Record Ex. A).

2. The plan was created in accordance with the requirements of the Internal Revenue Code (§§ 401-405) and the Employee Retirement Income Security Act of 1974 (ERISA).

3. The District Court ordered Dr. Koerpel to terminate the Plan and distribute \$100,000 from the corpus to Mrs. Koerpel as part of the Court's property award. (Findings of Fact and Conclusions of Law ¶ 7, Record on Appeal, Pages 211-219).

4. The District Court found that it had considered Dr. Koerpel's claim that ERISA barred the Court from ordering the termination of the Plan and determined that it had the authority to order Dr. Koerpel to terminate the Plan and the further authority to hold him in contempt if he failed to do so. Findings of Fact and Conclusions of Law of May 20, 1986, ¶ 4, Record on Appeal, Pages 441-446. Under the terms of the

Plan, neither Dr. Koerpel nor Mrs. Koerpel has reached his "earliest retirement age," the earliest date on which either could elect to receive retirement benefits, nor did the Plan provide for benefits of the kind awarded by the Court.

B. Facts relevant to the issue of whether the District Court erred in its child custody determination:

1. Robert McVaugh, Ph.D., the only expert to interview Dr. and Mrs. Koerpel and the minor children, concluded that the best interests of the minor children would be served by having Dr. Koerpel designated as the custodial parent and made this recommendation to the Court. (McVaugh Evaluation, Supplemental Record Ex. B.

2. The Court based plaintiffs custody award to Mrs. Koerpel on its finding that she was the primary care giver and that Dr. Koerpel had failed to demonstrate that he was a superior parent to Mrs. Koerpel. Findings of Fact and Conclusions of Law, Paragraph 9, Record on Appeal, Pages 211-219.

Facts relevant to the issue of whether the District Court erred in assigning all business debts to Dr. Koerpel:

1. Pursuant to a Temporary Stipulation and Order entered by Judge Donald Hyde on October 31, 1984, Dr. Koerpel was restrained from interfering with Mrs. Koerpel's businesses, either directly or indirectly, Record on Appeal, Pages 12-14.



2. In an Affidavit dated February 7, 1985, Mrs. Koerpel alleged that Dr. Koerpel had prevented her from using or occupying "her" office thus preventing her from adequately carrying on "her" businesses, Record on Appeal, Pages 18-20. On April 22, 1985, Dr. Koerpel filed a Motion with the District Court to have a receiver appointed for Meadows Medical Services, Inc., one of the entities which Mrs. Koerpel claimed to be one of "her" businesses, Record on Appeal, Pages 67-69.

3. In a hearing before Judge Hyde on May 3, 1985, plaintiff's counsel represented to the Court that Mrs. Koerpel's business, Meadows Medical Services, Inc., was current in the payment of its bills.

4. In her Affidavit dated October 2, 1985, Mrs. Koerpel stated that she had been operating a dialysis clinic and receiving income from that clinic. In that Affidavit she accused the defendant of intentionally interfering with her business by encouraging technicians to compete against her, Record on Appeal, Pages 133-136.

## SUMMARY OF ARGUMENTS

1. While judges have considerable latitude in fashioning property awards in domestic relations proceedings, they may not enter orders which would have the effect of violating statutes or impairing contracts. Since the enactment of ERISA in 1974, courts have wrestled with the issue of whether retirement plans created under ERISA are subject to domestic relations orders which contemplate benefits other than those set forth in the plan. In 1984, Congress laid this issue to rest by amending ERISA and creating Qualified Domestic Relations Orders (QDRO's). The QDRO amendment preempted state domestic relations law insofar as it limited the authority of state court justices to award plan benefits to spouses only when the QDRO provisions were met. The District Court's Decree ordering termination of Dr. Koerpel's professional corporation Plan is not a QDRO and hence is unenforceable.

2. In determining which parent should be awarded custody of minor children, the Court must serve the best interests of the children. Here, the Court awarded Mrs. Koerpel custody based upon a conclusion that she was the primary care provider during most of the minor children's lives and that there was "value" to be found in continuing the custody arrangement in place under the Temporary Custody

Order. The Court reached this conclusion against the recommendation of Dr. Robert McVaugh, a psychologist and the only expert to evaluate both parents and the children. In essence, the Court's custody award is based on an invocation of a maternal preference rule. This Court has recently repudiated use of a material preference rule because it deprives fathers of their rights, under the Utah and United States Constitutions.

3. The District Court erred in assigning all of the business debts to Dr. Koerpel. It concluded that Dr. Koerpel was the "moving force" behind the businesses and that he is in a better position to know what the liabilities of the businesses are. This conclusion is wholly unsupported by the compelling evidence in the record which documents without equivocation that Mrs. Koerpel considered herself to be in control of the businesses, even to the extent of obtaining a court order prohibiting Dr. Koerpel from "interfering," either directly or indirectly, in them.

## ARGUMENT

### I

THE 1984 AMENDMENTS TO ERISA PROHIBIT THE ENFORCEMENT OF STATE COURT ORDERS WHICH REQUIRE ALIENATION OF RETIREMENT PLANS IN A MANNER INCONSISTENT WITH THE ACT. ACCORDINGLY, THE DISTRICT COURT'S ORDER THAT DR. KOERPEL'S PLAN BE TERMINATED IS UNENFORCEABLE.

The enactment of ERISA 29 U.S.C. § 1001 et seq. in 1974 detonated an explosion of private pension and profit sharing plans in the United States. This was due, in great measure, to the tax advantages which could be realized by both employers and employees who enacted "qualified plans" under the Internal Revenue Code and ERISA. Among the prerequisites to "qualification" was a requirement that each pension plan provide that benefits provided under the plan not be assigned or alienated (29 U.S.C. § 1056(d)(1)). Additionally, ERISA contains a preemption section which declares that "this chapter shall supersede any and all state laws insofar as they now or hereafter relate to any employee benefit plan described (herein) . . . ." (29 U.S.C. § 1144(a)).

The enactment of ERISA with its anti-alienation and preemption provisions had the effect of sending federal pension law on a collision course with state domestic relations law. In the decade between the adoption of ERISA and the amendment creating Qualified Domestic Relations Orders, pension plan

administrators often confronted the dilemma of being ordered by a state court to pay over proceeds from an ERISA qualified plan in direct contravention of federal law and of plan provisions prohibiting alienation of benefits. As might be anticipated this situation stimulated substantial controversy. A line of cases which developed out of this conflict adopted the general view that Congress did not intend that ERISA preempt state domestic relations law permitting the attachment of benefits for the purpose of meeting those obligations. See, Biles v. Biles, 163 N.J. Super. 49 (N.J. Super. 1978); In re Marriage of Albert, 85 Cal. App. 3d 900 (Cal. App. 1978); Williams v. Williams, 163 Cal. App. 3d 793 (Cal. App. 1985).

In 1984, Congress responded to the uncertainty created by the conflict between ERISA and state domestic relations law by enacting an amendment to ERISA (29 U.S.C. § 1056(d)(3)). This amendment specified the circumstances under which a state court judge could fashion an order in a domestic relations action affecting an ERISA qualified plan without running afoul of ERISA's preemption provisions. A central component of these Qualified Domestic Relations Orders (QDRO's) is that they may not require a plan to provide any type or form of benefit not otherwise provided by the plan (29 U.S.C. § 1056(d)(3)). In other words, ERISA will permit a spouse to share in benefits

already contemplated under the terms of the plan, but it will not permit a spouse to enjoy benefits not contemplated by the plan.

Unquestionably, our state court judges enjoy broad discretion in fashioning property distribution--their decision-making guided by general principles of equity. English v. English, 565 P.2d 409 (Utah 1977). Within this general framework, however, judges are constrained from making property awards which violate statutes, impair contracts or are unconstitutional. For example, in Berry v. Berry, 635 P.2d 68 (1981), the Utah Supreme Court reversed what it considered to be a well-intentioned property award on the grounds that it impermissibly transgressed prohibitions imposed by Utah's partnership law against the sale of partnership assets.

Similarly, in this case, the District Court unequivocally stated in its Finding of Fact No. 4 of May 20, 1986, that federal law did not "prohibit the Court from exercising its personal jurisdiction over Dr. Koerpel in ordering him to terminate the Plan." Under the clear language of the 1984 amendment to ERISA, this finding is incorrect. Nothing in the Plan contemplates a benefit to either Dr. or Mrs. Koerpel in the form of the property distribution set forth by the Court, furthermore, neither Dr. Koerpel nor Mrs. Koerpel

is currently eligible to receive benefits under the terms of ERISA or the Plan. For this reason, the issue of the property distribution under the Decree of Divorce must be remanded to the District Court for redetermination in accordance with equity and applicable federal law.

## II

### THE COURT ABUSED ITS DISCRETION IN AWARDING CUSTODY OF JOSHUA JOHN KOERPEL AND BARDIN BLAKE KOERPEL TO MRS. KOERPEL.

In this domestic action, Dr. Koerpel sought an award of custody of his two sons, Joshua John Koerpel and Bardin Blake Koerpel. At trial, the Court received testimony and a written evaluation from Dr. Robert McVaugh, a psychologist and professor at Weber State College. After interviewing and administering numerous tests to Dr. and Mrs. Koerpel and each of their children, Dr. McVaugh concluded that the interests of the Koerpel boys would be served by awarding custody to Dr. Koerpel.

The Court rejected Dr. McVaugh's recommendation. As stated in its Findings of Fact, the Court based its award of custody to Mrs. Koerpel on a determination that Mrs. Koerpel had been the primary care provider for the children during most of their lives and that the custody arrangement which had been put in place by the Temporary Custody Order entered more than a

year before, appeared to be working. Findings and Fact and Conclusions of Law, paragraph 9. Record on Appeal, Pages 211-219. For the reasons that follow, neither of these grounds is adequate to overturn the recommendation of Dr. McVaugh.

First, it is improper to base a permanent custody award upon a finding that the children have been prospering under the terms of a temporary award. Temporary custody awards are routinely granted without the benefit of psychological evaluations, home studies, or the other recognized evidentiary bases for determining which parent can better serve the interests of the child as custodian. As a practical matter, they are exercises in expediency typically continuing the custodial status quo. Rarely are they supported by express findings of the Court. Certainly, if Dr. Koerpel had been the temporary custodial parent, that arrangement too would have "worked".

Dr. Koerpel was not, however, afforded an equal opportunity to demonstrate that the Koerpel boys would have prospered under his temporary custodial care. In short, the Court seized on a wholly fortuitous event--the designation of Mrs. Koerpel as the temporary custodial parent--and elevated it to the status of an evidentiary basis for an award of permanent custody. To permit a party who is granted temporary custody to



enjoy a presumption that she is entitled to an award of permanent custody is to greatly increase the stakes for the contestants in a temporary custody proceeding. Such a rule of law would necessarily create a more contentious environment, replete with demands for exhaustive evaluations, at a preliminary stage in the divorce proceedings when accommodation and expediency are at a premium.

The findings of fact also suggest that Mrs. Koerpel has been the primary care provider for the children. However, it is impossible to tell from the findings whether the trial court based its primary care finding on a functional analysis of primary care, or on visceral, gender-based reasoning. The only finding related to primary care concludes that the parties were approximately even in giving personal versus surrogate care.

In the recent case of Pusey v. Pusey, No. 20365 (Utah, August 18, 1986), this Court struck down the vestiges of maternal preference guidelines in this state; custody decisions are properly based only on functional considerations. Without further factual explanation of the trial court's primary care finding, its custody decision is tainted by the outdated maternal preference rule and should be remanded for further consideration.

Finally, the Court defended its custody award by stating that it was not satisfied "that the evidence shows the defendant (Dr. Koerpel) would be a superior parent to the extent that the Court should move the children from the plaintiff into the defendant's custody." (Findings of Fact and Conclusions of Law ¶/9, Record on Appeal, Pages 211-219). This statement demonstrates that the Court was imposing on Dr. Koerpel an impermissible burden of proving that he was a superior parent to Mrs. Koerpel. Of course, custody is to be determined with a view towards serving the best interests of the child. Here, the Court explicitly elevated the interests of the mother, Mrs. Koerpel, over the interests of either the children or Dr. Koerpel by requiring that Dr. Koerpel make a showing that he was a superior parent before considering him for a custody award. This represents a clear misstatement of Utah domestic relations law. It also reinforces the Court's improper placement of emphasis on temporary custody awards. Based on the Court's finding, the law in the State of Utah would appear to place on the parent not granted temporary custody the burden of showing that he or she was a superior parent when the time came to contest permanent custody. For these reasons, the Court committed error and abuse of discretion in awarding custody of Joshua John Koerpel and Bardin Blake Koerpel to Mrs. Koerpel.

### III

#### THE DISTRICT COURT ERRED BY INEQUITABLY ASSIGNING ALL BUSINESS LIABILITIES TO DR. KOERPEL

The District Court found that Dr. Koerpel was the "moving force behind all of the business ventures so he will inherit all business assets and all business liabilities . . . . The defendant (Dr. Koerpel) is in a better position to know what the liabilities are and to handle the liabilities." (Findings of Fact and Conclusions of Law ¶ 7, Record on Appeal, Pages 211-219). The businesses addressed in this finding were a hemodialysis clinic, Meadows Medical Services, Inc., and a tanning salon, Touch of Tan, Inc. In the interval since the entry of the Decree of Divorce, numerous lawsuits have been commenced by parties claiming to be creditors of these business entities. In addition, Mrs. Koerpel has forwarded to Dr. Koerpel a substantial number of bills incurred and unpaid by Meadows Medical Services, Inc.

A brief review of the record in this action amply demonstrates why the Trial Court's finding that Dr. Koerpel should assume the business debts because of his "better position to know" the nature of the liabilities is wholly without foundation. On October 30, 1984, Mrs. Koerpel signed a Verified Complaint for Divorce and Temporary Stipulation. Both

papers seek to have Dr. Koerpel restrained from interfering with Mrs. Koerpel's businesses (Meadows Medical Services and Touch of Tan, Inc.), either directly or indirectly. It was with considerable zeal that Mrs. Koerpel sought to insulate these businesses from any involvement or scrutiny by Dr. Koerpel. On February 7, 1985, Mrs. Koerpel signed an Affidavit in support of an Order to Show Cause in which she alleged that Dr. Koerpel had prevented her from using or occupying her office, which has prevented her from adequately carrying on her businesses (Record on Appeal, Pages 18-20). On April 22, 1985, Dr. Koerpel filed a Motion to Appoint a Receiver for Meadows Medical Services. This Motion was based upon the Affidavit of one of Meadows' employees, Larry Carlson. Mr. Carlson testified to extensive acts of mismanagement of Meadows by Mrs. Koerpel. Mrs. Koerpel responded by filing an Order to Show Cause supported by her Affidavit which reaffirmed her request for the entry of an order preventing Dr. Koerpel from interfering with Mrs. Koerpel's business known as Meadows Medical Services, Inc. in any way, either directly or indirectly.

At a subsequent hearing on May 3, 1985, Mrs. Koerpel's counsel represented to the Court that as of that date, Meadows Medical Service was current in the payment of its bills and

that so long as Dr. Koerpel continued to make his child support payments under the Court's Temporary Order, Mrs. Koerpel would not be required to take money from Meadows to support herself.

It is clear that from the outset of this divorce action, Mrs. Koerpel has taken the position that the businesses in question were hers. On numerous occasions, she has sought to seek the intervention of the Court to prohibit Dr. Koerpel from exercising any control over the management of these entities. At trial, Mrs. Koerpel presented documentary evidence in the form of a Statement of Net Assets. On this exhibit, Mrs. Koerpel again reflected no existing debt for either Meadows Medical Services, Inc. or Touch of Tan's parent, Streb-Kor, Inc. Notwithstanding the presence of unequivocal evidence that Mrs. Koerpel exercised exclusive control over these businesses, and her testimony that they were debt-free, Mrs. Koerpel initiated post-trial proceedings against Dr. Koerpel in which she sought to have him held in contempt of court for allegedly failing to pay a multitude of business obligations (see Affidavit of Judith Koerpel, March 6, 1986). The Affidavit of Barry Koerpel dated January 28, 1986, details many of the obligations which Mrs. Koerpel concealed from the Trial Court but for which she now seeks to have Dr. Koerpel stand accountable.

## CONCLUSION

The District Court erred in its decision to order Dr. Koerpel, in his position as administrator of a professional corporation Pension Plan, to terminate the plan. The Court's Order violates ERISA, the Federal statute governing such plans. Unqualified Orders such as these were specifically pre-empted by Congress to preserve the integrity of pension plans and benefits. The decision of the District Court on this issue was an error of law, and should be reversed.

The divorce decree in this case saddled Dr. Koerpel with obligations of which he was not aware and which he was in fact prohibited by judicial decree from controlling or mitigating. An inequity of this magnitude constitutes an abuse of discretion. The Court should therefore reverse and remand for redetermination of the property award consistent with a finding that Mrs. Koerpel, rather than Dr. Koerpel, controlled the fate of "her" businesses.

The Court should also reverse and remand on the issue of child custody. The Court's decision on this issue was based at least in part on impermissible considerations. These considerations were allowed to override the testimony of an unbiased professional custody evaluator that Dr. Koerpel would be a superior primary care provider. Because the findings of

the trial Court do not indicate with sufficient specificity how much weight was given to the impermissible considerations, the case should be remanded with instructions to base the custody award solely on functional factors. Only by requiring specific findings of functional facts can this Court ensure that custody awards will serve the best interests of children rather than mirror gender-based stereotypes.

Respectfully submitted this 25 day of August, 1986.

PRINCE, YEATES & GELDZAHLER

By



Ronald E. Nehring

Robert G. Wing

Attorneys for Appellant

7443D  
082586

**(d) Assignment or alienation of plan benefits**

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

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 of Title 26 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of Title 26.

(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.

(B) For purposes of this paragraph—

(i) the term “qualified domestic relations order” means a domestic relations order—

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term “domestic relations order” means any judgment, decree, or order (including approval of a property settlement agreement) which—

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

(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.

(D) A domestic relations order meets the requirements of this subparagraph only if such order—

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(E)(i) In the case of any payment before a participant has separated from service, a domestic relations order shall not be treated as failing to meet the requirements of clause (i) of subparagraph (D) solely because such order requires that payment of benefits be made to an alternate payee—

(I) on or after the date on which the participant attains (or would have attained) the earliest retirement age,

(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).

For purposes of subclause (II), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(ii) For purposes of this subparagraph, the term “earliest retirement age” has the meaning given such term by section 1055 (h)(3) of this title, except that in the case of any individual account plan, the earliest retirement age shall be the date which is 10 years before the normal retirement age.

(F) To the extent provided in any qualified domestic relations order—

(i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 1055 of this title, and

(ii) if married for at least 1 year, the former spouse shall be treated as meeting the requirements of section 1055(f) of this title.

(G)(i) In the case of any domestic relations order received by a plan—

(I) the plan administrator shall promptly notify the participant and any other alternate payee of the receipt of such order and the plan’s procedures for determining the qualified status of domestic relations orders, and

(II) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(ii) Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders. Such procedures—

(I) shall be in writing,

(II) shall provide for the notification of each person specified in a domestic relations order as entitled to payment of benefits under the plan (at the address included in the domestic relations order) of such procedures promptly upon receipt by the plan of the domestic relations order, and

(III) shall permit an alternate payee to designate a representative for receipt of copies of notices that are sent to the alternate payee with respect to a domestic relations order.

(H)(i) During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall segregate in a separate account in the plan or in an escrow account the amounts which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.

(ii) If within 18 months the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (plus any interest thereon) to the person or persons entitled thereto.

(iii) If within 18 months—

(I) it is determined that the order is not a qualified domestic relations order, or

(II) the issue as to whether such order is a qualified domestic relations order is not resolved,

then the plan administrator shall pay the segregated amounts (plus any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.

(iv) Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period shall be applied prospectively only.

(I) If a plan fiduciary acts in accordance with part 4 of this subtitle in—

(i) treating a domestic relations order as being (or not being) a qualified domestic relations order, or

(ii) taking action under subparagraph (H),

then the plan's obligation to the participant and each alternate payee shall be discharged to the extent of any payment made pursuant to such act.

(J) A person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this chapter a beneficiary under the plan. Nothing in the preceding sentence shall permit a requirement under section 1301 of this title of the payment of more than 1 premium with respect to a participant for any period.

(K) The term "alternate payee" means any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

(L) In prescribing regulations under this paragraph, the Secretary shall consult with the Secretary of the Treasury.

(Pub.L. 93-406, Title I, § 206, Sept. 2, 1974, 88 Stat. 864; Pub.L. 98-397, Title I, § 104(a), Aug. 23, 1984, 98 Stat. 1433.)

#### Historical Note

**References in Text.** The Social Security Act, referred to in subsec. (b), is Act Aug. 14, 1935, c. 531, 49 Stat. 620, as amended. Title II of the Social Security Act is classified generally to subchapter II (section 401 et seq.) of chapter 7 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables volume.

The Railroad Retirement Act of 1937, referred to in subsec. (b), is Act Aug. 29, 1935, c. 812, 49 Stat. 867, as amended generally by Act June 24, 1937, c. 382, part I, 50 Stat. 307, and which was classified principally to subchapter III (section 228a et seq.) of chapter 9 of Title 45, Railroads. The Railroad Retirement Act of 1937 was amended generally and redesignated the Railroad Retirement Act of 1974 by Pub.L. 93-445, title I, Oct. 16, 1974, 88 Stat. 1305. The Railroad Retirement Act of 1974 is classified generally to subchapter IV (section 231 et seq.) of chapter 9 of Title 45. For complete classification of these acts to the Code, see Tables volume.

**1984 Amendment.** Subsec. (d)(3). Pub.L. 98-397 added par. (3).

**Effective Date of 1984 Amendment.** Amendment by Pub.L. 98-397, applicable to plan years beginning after December 31, 1984, except as otherwise provided in sections 302(b), (c), (d) and 303 of Pub.L. 98-397, see section 302(a) of Pub.L. 98-397, set out as a note under section 1001 of this title.

**Effective Date.** Subsecs. (a) to (c) of this section applicable in the case of plan years beginning after Sept. 2, 1974, except as otherwise provided in section 1061 of this title, see section 1061(a) of this title.

Subsec. (d) of this section applicable with respect to plan years beginning after Dec. 31, 1975, except as otherwise provided in section 1061(d) of this title, see section 1061(b)(1) of this title.

In the case of plans in existence on Jan. 1, 1974, this section applicable in the case of plan years beginning after Dec. 31, 1975, except as otherwise provided in section 1061(c) and (d) of this title, see section 1061(b)(2) of this title.

**Legislative History.** For legislative history and purpose of Pub.L. 93-406, see 1974 U.S. Code Cong. and Adm. News, p. 4639. See, also, Pub.L. 98-397, 1984 U.S. Code Cong. and Adm. News, p. 2547.

#### Cross References

Effective date, see section 1061 of this title.

Minimum vesting standards, see section 1053 of this title.

#### Library References

Labor Relations Ⓔ131.7.

Master and Servant Ⓔ78.1(5).

C.J.S. Labor Relations § 124.

C.J.S. Master and Servant § 167 et seq.

#### Notes of Decisions

##### Assignment or alienation of benefits

Generally 17

Alimony and family support 18

Attachment 19

Bankruptcy 20

Execution of judgment 21

##### Assignment or alienation of benefits—Cont'd

Garnishment 22

Marital asset distribution 23

Commencement date of payment

Generally 11

Consent of employee for earlier date 12

Constitutionality 1