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MASTERING FAMILY CODE SECTION 3048 TO PROTECT CUSTODY ORDERS, DETER RELITIGATION OF JURISDICTION, ANDPREVENT ABDUCTIONS (PART I OF III)

LESLIE ELLEN SHEAR | LESCFLS@ME.COM

Family Code section 3048 (the Synclair-Cannon Child Abduction Prevention Act of 2002) is the most underutilized mandatory statute in the Family Code. Mastery of section 3048 has become even more important as our society becomes more mobile. Used properly, section 3048 deters collateral attacks on California custody orders, and efforts to establish jurisdiction in sister states, and in other nations, and prevents child abductions.[1]

The statute

mandates jurisdictional and due process findings in *every* custody-visitation order;

- requires judicial officers to sua sponte assess abduction risk;
- identifies abduction-risk factors;
- requires consideration of obstacles to enforcement of the custody-visitation orders;
- provides various abduction-prevention measures for courts to consider;
- requires each order to have notice that violation of the order can result in civil and criminal penalties.

Jurisdictional and Due Process Findings

This part of this three-part article provides guidance for drafting the jurisdictional and due process findings that must be include in *every* custody-visitation order, even if it merely addresses a small change or modification. Without detailed (not conclusionary) findings setting forth the legal and factual basis for California's jurisdiction, the orders are vulnerable to challenges in other proceedings for lack of jurisdiction or lack of due process. The conclusionary section 3048 findings in the Judicial Council forms are inadequate and leave California orders vulnerable to such collateral attacks.

WHAT'S INSIDE

ENFORCEMENT OF QDROS

By David T. Ruegg | QDRO Attorney | THE LAW OFFICES OF DAVID T RUEGG | WWW.QDRODIVISION.COM

You fought hard, the judgment your client wanted has been entered, the court ordered an equalization payment from the opposing party's "retirement accounts" and now ... opposing party is refusing to cooperate. What do you do?

Step 1-Find The Money

If you have not already done so, start by finding the money. If you know the employment history of the opposing party, can start by searching the following websites for more information on the accounts:

https://www.efast.dol.gov/5500Search/

(This government website is managed by the Department of Labor and searches filed IRS 5500 filings—filings required for all private plan established under ERISA—which includes all 401(k) plans. The 5500 filing contains useful information such as the contact information for the administrator and often the custodian of the funds.)

https://www.hicapitalize.com/find-my-401k/

(This website helps the user locate 3rd party administrators for various plans—example: Fidelity, Mass Mutual, or other providers.)

If an account was not previously disclosed, you can rely on FC section 2556 to request a division of the omitted account(s) in question. FC section 2556 reads:

> In a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, the court has continuing jurisdiction to award community estate assets or community estate liabilities to the parties that have not been previously adjudicated by a judgment in the proceeding. A party may file a postjudgment motion or order to show cause in the proceeding in order to obtain adjudication of any community estate asset or liability omitted or not adjudicated by the judgment. In these cases, the court shall equally divide the omitted or unadjudicated community estate asset or liability, unless the court finds upon good cause shown that the interests of justice require an unequal division of the asset or liability.

If the non-disclosure was accidental, then request a standard community property split (50-50 of what was earned during the community time frame, plus earnings thereon). If the non-disclosure was intentional and egregious, then consider requesting 100% disgorgement, as discussed later in this article.

Until 2020 when David Ruegg and his family moved to Texas, David was a Southern California native, completing his BS at the University of Southern California and obtaining his law degree from Chapman University, where he obtained a tax emphasis certificate. Within the Family Law context, David exclusively handles the division of employee benefit plans (QDROs). David is a recognized expert in his field and his resume includes published articles, testifying in court as a QDRO expert, and presenting to many bar associations and related family law organizations on QDRO/retirement benefit issues.

Step 2-Freeze the Money

First and foremost, you should protect your client's interest by freezing the account(s) in question. To do this 'fast' send over a notice of adverse interest by fax, email, and mail (I recommend you send on pleading paper with a proof of service). Make sure you redact personal information such as the SSN and DOB of the account holder when filing the notice at court, but include the information on the version sent to the plan, so the plan can locate the account, which is typically connected to the SSN of the account holder in their database:

"YOU ARE HEREBY NOTIFIED that {{Petitioner}} is claiming a community property interest in {{Respondent}}'s pension, 401(k), stock option, deferred compensation, or retirement benefits (both qualified and non-qualified) under any Plan which you maintain for the benefit of {{Respondent}}, SSN# {{RespondentSSN}}, DOB {{RespondentDOB}}. This notice is pursuant to California Family Code §755.

Should you pay any such claims following this notice, you and/or the plan will be subject to liability for such payments pursuant to In re Marriage of Baker (1988) 204 Cal.App.3d 206, 251 Cal.Rptr. 126. and will not be eligible for the protection afforded by California Family Code §755(b).

You are hereby instructed to pay no claims and allow no elections (excepting therefrom investment choices which may be exercised by participants pursuant to Internal Revenue Code §404(c)) under any plans, policies or accounts which you may maintain for the benefit of {{Respondent}}."

Many family lawyers rely on joinders to freeze up retirement funds. There is nothing wrong with using joinders for this purpose, however, reliance on a joinder is not a foolproof strategy. 401(k) plans are established under Federal ERISA law and therefore are technically exempt from compliance with local state court orders that are not 'qualified QDROs,' meaning the 401(k) administrator can disregard your joinder under federal preemption. While commonly misunderstood, this is no secret, as noted: California Judicial Council Form FL-318-INFO provides a chart that specifically carves out/excludes 401(k) plans, as 'not needing' a joiner.

Step 3-Enter QDRO Without Another Hearing if Judicial Officer Allows

The last thing your client wants to hear is that you recommend going back to court for yet another hearing. For most judges in most counties, you can enter QDROs without filing a request for order. After all, you are not asking for a new court order, you are asking for an existing court order be enforced. The procedure is similar to a 'findings order after hearing' in most counties. The law that you will want to cite to remind the court of their authority is as follows:

"TO: THE OPPOSING PARTY AND APPLICABLE COUNSEL OF RECORD: NOTICE IS HEREBY GIVEN that pursuant to Family Code 2610 and California Rule of Court 5.2(g) {{Petitioner}} is submitting a proposed Domestic Relations Order to the Court for entry with respect to the division of the following retirement plan(s): {{PlanName}}.

The purpose of entering this Order is to enforce an existing judgment or Order as described in In re Marriage of Bowen (2001) 91 Cal. App. 4lh 1291. An example of a Domestic Relations Order that seeks to enforce an existing judgment is the Qualified Domestic Relations Order for Support for which procedure there is an optional Judicial Council form (FL-460) that does not require a noticed hearing. Family Code 2610(a) is specifically not limited to its named examples. Family Code 20610(a) states:

> 2610. (a) Except as provided in subdivision (b), the court shall make whatever orders are necessary or appropriate to ensure that each party receives the party's full community property share in any retirement plan, whether public or private, including all survivor and death benefits, including, but not limited to, any of the following:… [Emphasis added]

California Rule of Court 5.2(g) further empowers the Family Court to adopt any suitable process to enforce its Orders. California Rule of Court 5.2(g) states:

> (g) Implied procedures–In the exercise of the court's jurisdiction under the Family Code, if the course of proceeding is not specifically indicated by statute or these rules, any suitable process or mode of proceeding may be adopted by the court that is consistent with the spirit of the Family Code and these rules. [Emphasis added]

Pursuant to Family Code 2610(a), and California Rule of Court 5.2(g), {{Petitioner}} respectfully requests the Court's signature and entry of the proposed Order(s) submitted concurrently herewith."

Some counties have gone as far as to codify a local procedure for entry of QDROs, including procedures for submitting QDROs without the consent of the noncooperative party. For example, Orange County has adopted Local Rule 702(D)(4)(c) which outlines the procedure for entry of QDROs as follows if one party refuses to cooperate:

"4. An order may be submitted to the court for signature by a judicial officer and filing only if it fulfills one of the following requirements:

c. It is signed only by one party and a copy is served by mail with a statement under oath of the manner in which the mailing address of the other party was obtained, or is personally served upon the other party together with a proof of service.

i. The proof of service must include a notice that the responding party has 30 days from the date of mailing or personal service to file an objection with the clerk of the court and serve a copy on the other party.

ii. If an objection is not timely filed and served then the order shall be submitted by the clerk to a judicial officer for signature and filing."

For those cases that are not in Orange County, keep in mind some judicial officers have a 'policy' requiring a noticed hearing every time. If your client is forced to pay extra for you to appear at a noticed hearing, you should probably consider asking for an additional sum from the underlying retirement account as discussed next in this article.

Step 4-Request More Money Due To Non-Compliance

One hurdle to enforcement of judgments in any 'collection action' is the underlying cost of enforcement itself—if the cost exceeds the benefit, it's simply impractical to pursue enforcement. There are a couple of strategies that can make an enforcement action more attractive to the client.

OPTION 1 -Adjust the underlying asset division to reimburse the cooperating party for additional fees expended on enforcement.

As with any enforcement action, attorney fees paid for enforcement of the underlying court order can be 'added on top' and charged against the non-compliant party, pursuant to the 'Tice' case.[1] In the Tice case, the alternate payee was owed unpaid support and utilized a QDRO for purposes of collection. The court determined it was appropriate to award an additional sum to cover the additional attorney fees and court expenses necessary to enforce the existing order for support.

While this strategy works well for 401(k) plans by simply adding in an equalization provision to the QDRO for the additional sum certain, it is more challenging for a pension plan. Make sure you are always seeking pre-approval of the QDRO you are submitting to court, especially if you are deviating from the 'standard template' the plan is accustomed to seeing.

OPTION 2 -Ask for 100% of the underlying accountas a penalty.

Sometimes in enforcement actions, the noncompliant party has acted so egregiously, that the penalty of disgorgement should be applied. Family Code section 1101, subdivisions (a), (g), (h) outline when disgorgement might be appropriate:

> 1101(a) A spouse has a claim against the other spouse for any breach of the fiduciary duty that results in impairment to the claimant spouse's present undivided one-half interest in the community estate, including, but not limited to, a single transaction or a pattern or series of transactions, which transaction or transactions have caused or will cause a detrimental impact to the claimant spouse's undivided one-half interest in the community estate.
>
> 1101(g) Remedies for breach of the fiduciary duty by one spouse, including those set out in Sections 721 and 1100, shall include, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs. The value of the asset shall be determined to be its highest value at the date of the breach of the fiduciary duty, the date of the sale or disposition of the asset, or the date of the award by the court. (Emphasis added)
>
> 1101(h) Remedies for the breach of the fiduciary duty by one spouse, as set forth in Sections 721 and 1100, when the breach falls within the ambit of Section 3294 of the Civil Code shall include, but not be limited to, an award to the other spouse of 100 percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty. (Emphasis added)

Disgorgement is rare and typically reserved for only the most egregious fact patterns. Consider pleading it in the alternative and using it as 'motivation for settlement' with the opposing party.

Unique Scenarios-Enforcement Against Pension Plans Already in Pay-Status

A common scenario that might walk into your office is: Potential client advises their former spouse retired 10 years ago, never told them, and never shared any of the payments. Obviously, the potential client wants to collect their share of the pension and any back pay due and owing.

First, you will want to check if any defined contribution accounts still exist. The easiest way to solve this collection problem is a 'lump sum payment' from a 401(k) or similar account.

Unless you are dealing with a 'Cash Balance Plan' type pension, the pension administrator for a 'traditional pension' will not typically accept a directive to 'pay an extra $500 each month' until a sum certain is paid in full. This request will likely be met with the following response: "We are not a collection agency, your client should seek reimbursement from the account holder directly."

There are two logical solutions you can apply in this scenario:

(1) Request a larger percentage of the monthly pension income for the life of the payments. To do this, hire the services of an actuary/valuation specialist, who will calculate the appropriate percentage adjustment increase that would result in a repayment of the obligation over your client's lifetime. Counsel needs to be mindful of the survivor benefit elected at the time of retirement when deploying this strategy (if any was elected at all). If no survivor benefits are in place, your carefully negotiated settlement will die when the employee spouse dies and your brilliant strategy will seem ... not so brilliant.

(2) You could also request a higher percentage award until the debt is paid in full, and then amend the QDRO to drop the percentage back to the community property portion. For example, the first QDRO might award 60% of the monthly payments. After leaving this QDRO in place for the next 5 years, your client or the opposing party can return to file a second QDRO, that drops the payment back down to 50% of the community interest. When applying this strategy, counsel must fully understand the difference between a 'shared interest' QDRO and a 'separate interest' QDRO. Under a shared interest QDRO-the monthly stream of payments can be adjusted like a dimmer switch on a lightbulb-since the money is flowing from a single account. However, under a 'separate interest' QDRO, the pension is divided into separate account, meaning all the kings horses and all the kings men, cannot merge the pension accounts back together again. Seeking preapproval before filing a QDRO and asking clarifying questions, is essential when drafting QDROs.

Unique Scenarios-Loss of Survivor Benefits

Perhaps one of the most overlooked topics that deserves more attention is the loss of survivor benefits. California law recognizes the importance of protecting survivor benefits under multiple cases and code sections.[2]

If survivor benefits are awarded and subsequently lost through the actions of the employee spouse, two logical options may be pursued as a remedy:

1. Counsel for the injured party can request life insurance coverage to protect the injured party from an untimely death of the account holder. This solution

may not work if the account holder is uninsurable, or the cost is prohibitive. Counsel should seek the guidance of an actuary to value the lost survivor benefits to determine how much coverage is appropriate.

2. Counsel for the injured party can request an additional award of the pension benefits that are payable during the life of the employee spouse, to compensate for the divested survivor benefits. This award can be made either by an increase in the percentage split of the monthly pension benefits or a lump sum payment if funds exist to satisfy the award. Again, the services of an actuary/valuation specialist would be needed to value the divested survivor benefits.

Unique Scenarios-Enforcement of Child/Spousal Support

Attorneys often forget that unpaid child or spousal support obligations can be enforced by way of QDRO. In fact, there is a judicial council form specifically designed for this purpose: FL-460. FL-460 is not acceptable to all retirement administrators, as many require a 'custom QDRO'. For those administrators requiring "custom QDROs," counsel should start by requesting a 'template' if one exists on file with the administrator. As discussed above, pursuant to the *Tice* case, counsel can 'add attorneys fees' on top of the existing obligation, since a support QDRO would be an enforcement action.

Since a support QDRO is an enforcement tool no different from a bank levy, wage garnishment or real property lien, the court may need a reminder that enforcement of child/spousal support by way of QDRO does not require both parties' to sign. Just as FL-460 does not require a noticed motion to be entered, a 'custom Support QDRO' on pleading paper does not require a noticed motion.

Conclusion

Always make sure you check with the plan administrator that your QDRO is pre-approved BEFORE you file it. It is quite frustrating to jump through the procedural hoops of filing a QDRO, only to find out the money was moved or the QDRO requires further 'magic language' pursuant to plan policies and procedures. As a reminder, all California attorneys have a duty of competence.[3] Due to the technical nature of QDROs, it is highly recommended that family law counsel engages the services of a QDRO attorney.

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1 *Trustees of the Directors Guild of America-Producer Pension Benefits Plans v. Tice* (9th Cir. 2000) 234 F.3d 415.

2 FC §§ 2610, 2337; *Erndt v. Erndt* (2021) 59 Cal.App.5th 898.

3 State Bar of Cal. Rules Prof. Conduct, rule 1.1 Competence.