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Same-Sex Divorce, ERISA, and the Defense of Marriage Act

Benjamin Takis
Bredhoff & Kaiser, PLLC
Washington, D.C.

Introduction

The subject of same-sex marriage, and its effect on the administration of employee benefit plans, has generated much notoriety over the past few years. However, another issue that has so far drawn little attention looms in the background: What happens when same-sex marriages end in divorce? More particularly, this report examines the issue of how the Employee Retirement Income Security Act ("ERISA")[1] applies to "domestic relations orders" issued by courts that purport to grant pension rights to divorced gay spouses under state domestic relations law.

As more states begin to recognize same-sex marriage, or create civil union regimes that function identically to marriage for the purposes of divorce,[2] it is inevitable that controversies involving the separation of pension assets through same-sex divorce proceedings will arise. Indeed, some of the complications posed by same-sex divorce have already drawn press coverage—particularly as same-sex couples married in states such as Massachusetts or Connecticut seek divorce in other states that do not recognize same-sex marriage.[3] This report addresses the simplest scenario likely to appear before a court or plan administrator, wherein the state in question has fully recognized that same-sex spouses are "married" under state law, and a state court has issued a domestic relations order providing that a same-sex spouse is to receive a portion of the other spouse's pension.[4]

Resolving these controversies may not be as simple as some in the employee benefits community have assumed. To the extent that practitioners have concluded that § 3 of the Defense of Marriage Act ("DOMA")[5] clearly prohibits a plan from recognizing a qualified domestic relations order ("QDRO") involving a same-sex spouse,[6] further consideration may be warranted.

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[1] Pub. L. No. 93-406, 88 Stat. 832 (codified as amended in scattered sections of 29 U.S.C.) (1974).

[2] State recognition of same-sex marriage can take many possible forms, from granting the full status of "marriage," as in Iowa, Connecticut, Massachusetts, and Vermont, to creating new "civil union" regimes, as in New Jersey, to somewhere in between.

[3] *See, e.g.,* Stephanie Chen, *Serious Legal Hurdles for Gay Divorce,* CNN.com, May 3, 2010, *available at* http://www.cnn.com/2010/LIVING/05/03/texas.gay.divorce/index.html; Sue Horton, *The Next Same-Sex Challenge: Divorce,* Los Angeles Times, July 25, 2008, *available at http://articles.latimes.com/2008/jul/25/local/me-gaydivorce25.*

[4] Domestic relations order are usually issued by courts, but can also be enforced where issued by "any state agency or instrumentality with the authority to issue judgments, decrees, or orders, or to approve property settlement agreements, pursuant to state domestic relations law (including community property law)." *The Division of Pensions Through Qualified Domestic Relations Orders,* Q&A 1-3, *available at* http://www.dol.gov/ebsa/publications/qdros.html (hereinafter *DOL QDRO Manual*).

[5] 1 U.S.C. § 7 (2000).

[6] *See, e.g.,* David M. Glaser, *Impact of Same-Sex Marriages in Massachusetts on Employee Benefits Law: What Employers Need to Know,* 32 BNA *Tax Management Compensation Planning Journal* 267, 269 (2004) ("[I]t is anticipated that no part of a participant's retirement benefit will be transferable to a former

Claimants seeking enforcement of same-sex domestic relations orders have strong arguments that the QDRO provisions,[7] which were first instituted as part of the Retirement Equity Act ("REA") in 1984,[8] compel a plan to honor a same-sex domestic relations order issued pursuant to state domestic relations law, even where such state law conflicts with DOMA. This report explores these arguments.

On its face, DOMA appears a model of legislative clarity. DOMA § 3 states:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United states, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[9]

Applying DOMA to ERISA, the tax code, and other federal statutes requiring a definition of "spouse" is generally a straightforward matter. For instance, ERISA § 205 requires pension plans to give survivorship rights to spouses of plan participants.[10] Applying the DOMA definition of "spouse," it is clear that these survivorship rights do not apply to same-sex spouses, regardless of whether the participant's home state recognizes same-sex marriage.[11]

The ambiguity arises only when applying DOMA to ERISA § 206(d)(3), a unique set of provisions that generally defer to state law in determining spousal status. ERISA § 206(d)(3) provides for the assignment of pension benefits in the form of a QDRO, a narrow exception to the strict rule in ERISA forbidding alienation of pension benefits.[12] These provisions obligate plan administrators to respect domestic relations orders "made pursuant to a state domestic relations law (including a community property law)"[13] and which relate "to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant,"[14] so long as the orders satisfy other enumerated criteria generally designed to protect the plan.[15] If a domestic relations order meets these criteria it becomes a QDRO, and the divorced spouse, child, or other dependent becomes an "alternate payee," entitled to all the rights of a beneficiary under ERISA.[16] Thus, while DOMA purports to limit the word "spouse" to mean "opposite sex spouse" in all federal laws, regulations and administrative rulings, ERISA's QDRO provisions generally compel plan administrators to defer to the state law determination of spousal rights.

The first three sections of this report confront three of the most likely statutory arguments in favor of applying the DOMA definition of "spouse," and the counterarguments in favor of deferring to state law determinations of spousal status. The arguments supporting QDRO rights for same-sex spouses unfold as follows:

- first, federal law does not preempt state law so long as the requirements of a QDRO are satisfied;
- second, the QDRO provisions make the determination of spousal status the exclusive province of the states; and
- third, DOMA does not alter this scheme of state law exclusivity over spousal issues, since there is neither an opportunity nor a need to "determin[e] the meaning" of "spouse" under federal law
.[17]

The final section of this report examines the competing policy concerns underlying DOMA, REA, and ERISA, and outlines the argument that the unique circumstances of a QDRO do not implicate Congress's concerns regarding the extension of federal "rights" and "benefits" to homosexuals, because a right to payment under a QDRO is more akin to a *state law* right. The policy behind DOMA is therefore arguably weaker in the area of QDRO administration than the policy behind REA and ERISA of permitting state domestic relations law to decide on the appropriate allocation of pension benefits upon divorce.

ERISA Preemption

The first argument in favor of applying DOMA to preclude recognition of same-sex domestic relations orders is based on ERISA § 514(a), the preemption section.[18] The Supreme Court has noted that ERISA is a "comprehensive and reticulated" statute,[19] with a famously broad preemption clause.[20]

State domestic relations law is no exception, as illustrated by two key Supreme Court cases, *Boggs v.*

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same-sex spouse through a QDRO").

[7] ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3); *see also* I.R.C. § 414(p) . For convenience, this report refers mainly to ERISA rather than the Internal Revenue Code, as the language used in the tax code and ERISA is exactly parallel, and there are other relevant issues, such as preemption, that are unique to ERISA.

[8] Pub. L. No. 98-397, 98 Stat. 1426 (1984).

[9] DOMA § 3, 1 U.S.C. § 7.

[10] *See* ERISA § 205(a), 29 U.S.C. § 1055(a).

[11] Further, ERISA preempts state laws that "relate to any employee benefit plan." ERISA § 514(a), 29 U.S.C. § 1144(a).

[12] ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1); *see also Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365*, 493 U.S. 365, 11 EBC 2337 (1990).

[13] ERISA § 206(d)(3)(B)(ii)(II), 29 U.S.C. § 1056(d)(3)(B)(ii)(II).

[14] ERISA § 206(d)(3)(B)(ii)(I), 29 U.S.C. § 1056(d)(3)(B)(ii)(I).

[15] ERISA § 206(d)(3)(C) and (D), 29 U.S.C. § 1056(d)(3)(C) and (D).

[16] ERISA § 206(d)(3)(J), 29 U.S.C. § 1056(d)(3)(J).

[17] DOMA § 3, 1 U.S.C. § 7.

[18] ERISA § 514(a), 29 U.S.C. § 1144(a).

[19] *Varity Corp. v. Howe*, 516 U.S. 489, 516, 19 EBC 2761 (1996).

[20] *See, e.g., Aetna Health Inc. v. Davila*, 542 U.S. 200, 32 EBC 2569 (2004) (preempting Texas law requiring due care when making health plan coverage decisions). *Cf. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645, 19 EBC 1137 (1995) (retreating somewhat from a prior overly capacious interpretation of the "relate to" clause).

Boggs[21] and *Egelhoff v. Egelhoff*.[22] Since DOMA supplies the definition of "spouse" used in ERISA, the argument goes, DOMA acquires ERISA's broad preemptive force. Therefore, any state law which purports to recognize same-sex spousal rights in divorce proceedings must give way to the federal definition of "marriage" and "spouse."

This argument has a surface appeal, but can be easily dismissed, as ERISA preemption is ultimately irrelevant to the narrow issue here. ERISA § 514(b)(7) clearly and unequivocally exempts QDROs from § 514(a) preemption.[23] In other words, so long as a domestic relations order meets the requirements of a QDRO, preemption does not apply. Thus, we are back where we started, with the question of whether a same-sex domestic relations order qualifies as a QDRO.

Outside of the QDRO context, state domestic relations law is indeed generally preempted by ERISA. In *Boggs*, a 5-4 opinion, the Supreme Court held that a non-participant spouse could not bequeath to her children her community property interest in her participant husband's pension.[24] The majority reasoned in part that the QDRO provisions represent a narrow exception to ERISA's anti-alienation norm, so the transfer of a community property interest cannot be valid if not made pursuant to the QDRO provisions or another express exception to the anti-alienation rule.[25] The majority also stressed that this particular transfer conflicted with the survivorship rights of Mr. Boggs' subsequent wife, further necessitating preemption.[26] We learn from *Boggs* only that transfers that do not conform to the QDRO rules are preempted. This reveals little about the present issue, which is fundamentally about how to interpret the QDRO provisions themselves.

Similarly, the Supreme Court in *Egelhoff* held that ERISA preempted a Washington law requiring automatic revocation of a former spouse's beneficiary status for non-probate assets (e.g., life insurance) upon divorce, reasoning that such a scheme would place an undue burden on plan administrators to keep track of varying beneficiary rules rather than simply relying on the plan documents.[27] Again, while this case is relevant for the proposition that state family law must give way to ERISA where it conflicts with the plan or interferes with uniform plan administration,[28] it does not speak to the issue of whether ERISA has by its terms embraced state domestic relations law for the purposes of a QDRO. The question is whether DOMA overrides this presumption by inserting an opposite-sex requirement into ERISA § 206(d)(3). The answer must necessarily be found in the wording and purpose of the respective statutes.

Alternate Payee

A formidable argument can be made that DOMA imposes an additional "opposite sex spouse" requirement that a domestic relations order must satisfy before it can be considered a QDRO. ERISA § 206(d)(3)(B) provides that a QDRO is a domestic relations order which creates or recognizes an alternate payee's right, 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.[29]

ERISA § 206(d)(3)(K) in turn defines "alternate payee" as "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."[30]

Thus, the argument goes, ERISA lists the exclusive classes of individuals who can be treated as an "alternate payee." Only an alternate payee can have QDRO rights, and since DOMA applies to all federal laws, regulations, and administrative rulings, only an opposite-sex spouse can be considered an alternate payee under ERISA.[31] Any domestic relations order that purports to enlarge the class of alternate payees to include same-sex spouses will not be qualified, and is therefore preempted and in violation of ERISA § 206(d)(1).

This is a strong argument, but a claimant seeking enforcement of a same-sex domestic relations order would counter that the elements comprising "alternate payee" status are tested at the state rather than federal level. In the QDRO provisions, ERISA has carefully and purposefully allocated jurisdiction and responsibility between state courts, plan administrators, and fed-

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[21] 520 U.S. 833, 21 EBC 1047 (1997).

[22] 532 U.S. 141, 25 EBC 2089 (2001).

[23] ERISA § 514(b)(7), 29 U.S.C. § 1144(b)(7). Indeed, as discussed below, the QDRO provisions were passed specifically to resolve this preemption issue in favor of state domestic relations law.

[24] *Boggs*, 520 U.S. at 835.

[25] *Id.*

[26] *Id.* at 843-844.

[27] *Egelhoff*, 532 U.S. at 147.

[28] Note, however, that the Supreme Court hesitates to displace areas of traditional state regulation unless ERISA expressly compels such a result. *See, e.g., New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 654, 19 EBC 1137 (1995) ("[D]espite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law."). Since family law is unquestionably an area of traditional state regulation, there is a "considerable burden" in overcoming the presumption against preemption. *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 814, 21 EBC 1041 (1997).

[29] ERISA § 206(d)(3)(B)(i), 29 U.S.C. § 1056(d)(3)(B)(i).

[30] ERISA § 206(d)(3)(K), 29 U.S.C. § 1056(d)(3)(K).

[31] It is theoretically possible for an opposite-sex spouse to be an alternate payee by qualifying as an "other dependent." However, the definition of "dependent" is subject to strict limitations that limit its effectiveness with respect to most same-sex couples. A dependent who is not a "qualifying child" must receive over half of his/her support from the taxpayer, and must not have gross income less than $3,650 in 2010 (subject to increases in future years for inflation). I.R.C. § 152(d)(1). Such a situation is possible but increasingly rare in today's society of two-earner households.

eral courts.[32] In so doing, ERISA has taken the elements of "alternate payee" status off the table for federal purposes, to be determined exclusively at the state level, with plan administrators checking only to see that various administrative requirements have been satisfied. The issue of whether DOMA modifies this scheme is addressed further below, but for now the important premise of the argument is that the elements of "alternate payee" status do not require or allow the application of a federal determination of the meaning of the word "spouse."

A closer look at the structure of ERISA § 206(d)(3) reveals this system. The basic rule is laid out in § 206(d)(3)(A), subject to the substantive requirements of (B), (C), and (D), the core QDRO provisions. Subsections (E)-(N) provide further clarifications, definitions, and clauses addressing certain specific factual situations.[33]

Within this three-part qualification system, subsection (B) concerns the creation of domestic relations orders, subsection (C) imposes the affirmative requirements that a domestic relations order must meet in order to be qualified, and subsection (D) ensures that the benefit paid to the alternate payee merely divides rather than enlarges the total benefit paid out by the plan. It has long been understood that subsection (B) generally defers to state domestic relations law, while subsections (C) and (D) provide the federal requirements that turn a domestic relations order into a QDRO, which plan administrators are required to honor.

As explained by the majority opinion in *Boggs*, the purpose of the QDRO provisions was to enshrine the protections granted to spouses under state law, adding only the uniform administrative requirements necessary to minimize the burden on plans and plan administrators:

> Support obligations, in particular, are "deeply rooted moral responsibilities" that Congress is unlikely to have intended to intrude upon. In accord with these principles, Congress ensured that state domestic relations orders, as long as they meet certain statutory requirements, are not preempted. (citations omitted).[34]

This understanding of the statute, wherein state court determinations in creating the domestic relations order are final, and plan administrators and federal courts apply the federal requirements of (C) and (D), has had considerable support in the courts.[35] For example, the Seventh Circuit in *Blue v. UAL Corp*,[36] explained that "[a] state court's domestic relations order overrides the terms of the plan if it meets seven criteria laid down in . . . [C] and [D]."[37] *Blue* involved a QDRO issued to compel payment of the plaintiff's child support obligations, which the plaintiff challenged in federal court as an incorrect implementation of state law.[38] The fund responded that they are neither required nor permitted to look behind the face of the state court's orders when implementing a QDRO.[39] The Seventh Circuit agreed, stating that:

> Administrators are entitled to implement what the forms say, rather than what the signatories may have sought to convey. So, too, plans may mechanically implement orders from state courts. Reviewing the substance of these orders would increase the costs of pension administration (costs ultimately passed on to beneficiaries), increase the error rate (to the detriment of participants and their loved ones), and cause delay as plans carried out the additional inquiries (again to the detriment of beneficiaries, who may need the income quickly). (citations omitted).[40]

The court stressed that producing a domestic relations order was purely a function of state law and state courts:

> ERISA's allocation of functions—in which state courts apply state law to the facts, and pension plans determine whether the resulting orders adequately identify the payee and fall within the limits of benefits available under the plan—is eminently sensible. Pension plan administrators are not lawyers, let alone judges, and the spectacle of administrators second-guessing state judges' decisions under state law would be repellent.[41]

Under this view, a QDRO proceeds in two stages. In the first stage, state domestic relations law is applied to

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[32] *DOL QDRO Manual*, Q&A 1-13.

[33] For instance, § 206(d)(3)(E) states that a domestic relations order will not fail to be qualified for commencing payments to an alternate payee prior to the participant's separation from service if the payments commence no earlier than the "earliest retirement age" at which the participant could have began receiving payments, as defined by the statute; § 206(d)(3)(F) provides that a QDRO can treat a former spouse as a surviving spouse for the purposes of survivorship rights; and § 206(d)(3)(G) requires plans to maintain written procedures for determining the qualified status of domestic relations orders.

[34] *Boggs*, 520 U.S. at 848.

[35] *See, e.g., Mack v. Kuckenmeister*, 619 F.3d 1010, 49 EBC 1818 (9th Cir. 2010) ("[S]tate family law, not ERISA, has created, recognized, or assigned the alternate payee's right to plan benefits . . . ERISA merely describes which state law created interests are enforceable in court."); *Matassarin v. Lynch*, 174 F.3d 549, 569, 23 EBC 1663 (5th Cir. 1999) ("We cannot say that a federal court's role extends as far as examining the circumstances under which a potential beneficiary entered and a state court approved a QDRO. Such a claim affects domestic relations, which is not an area of exclusive federal concern."); *Board of Trustees of the Laborers Pension Trust Fund v. Levingston*, 816 F.Supp. 1496, 16 EBC 2147 (N.D. Cal. 1993) (federal courts should defer to a prior state court determination that a state decree is a QDRO, without independent review of the merits of that determination); *see also* John H. Langbein & Bruce A. Wolk, *Pension and Employee Benefit Law 588* (3d ed. 2000) ("The QDRO rules undertake to subject pension wealth to state domestic relations jurisdiction as fully as possible, while nevertheless minimizing the burden on plans.").

[36] 160 F.3d 383, 22 EBC 1941 (7th Cir. 1998).

[37] *Id.* at 385.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 386.

[41] *Id. See also Marker v. Northrop Grumman Space and Missions Systems Corp.*, 39 EBC 1004 (N.D. Ill. 2006) (holding that a plan improperly looked beyond the face of a domestic relations order by rejecting the order on the grounds that it was not consistent with the judgment for dissolution of the marriage).

the parties to produce a divorce decree. Once the order has been issued by a state court, it is accepted as a sound application of marital rights and tested according to ERISA's administrative standards.[42] The plan administrator receives a QDRO only in the second stage, and it is generally of no concern to the plan whom the state authority has recognized as having spousal rights.[43] The court in *Blue* summed up the plan administrator's role in stating that "ERISA does not require, or even permit, a pension fund to look beneath the surface of the order."[44] Generally, plan administrators are concerned only that the form and timing of the benefits are made clear, and that the QDRO only divides benefits otherwise payable to the participant rather than creating new benefits for the alternate payee.[45] Entanglement in domestic controversies is usually a burden that plans prefer to avoid.[46]

A proponent of QDRO rights for same-sex spouses would argue that this interpretation is fully consistent with the text of the statute. ERISA § 206(d)(3)(B) requires that a domestic relations order (1) relate "to the provision of child support, alimony payments, or marital property rights of a spouse, former spouse, child, or dependent of a participant" *and* (2) be "made pursuant to a state domestic relations law."[47]

The first prong of ERISA § 206(d)(3)(B)(ii) thus identifies the specific area of law applicable to a QDRO (e.g., marital rights of spouses), and the second prong defers to "state domestic relations law (including community property law)" for the narrow area of law identified in the first prong. Under this reading, the first prong is neither superfluous nor insignificant. The first prong distinguishes, for instance, divorce decrees from intestate transfers and other automatic transfers of rights held as preempted by *Egelhoff*.[48] The first prong makes it clear that ERISA respects only a narrow class of state domestic relations law, and does not give free reign to all manner of state property rights. Similarly, *Boggs* illustrates that, although ERISA § 206(d)(3)(B)(ii)(II) respects community property law for the purpose of allocating marital assets in a QDRO, such community property laws do not operate broadly outside of provisions of "child support, alimony payments, or marital property rights of a spouse."[49] Thus, *Boggs* stands for the principle that state domestic relations law (including community property law) operates in the context of divorce proceedings *but not in all contexts in which it might otherwise operate*. The first prong of § 206(d)(3)(B)(ii) effectuates this narrowing of the field of applicable state law. The second prong, in short, makes it clear that state domestic relations law dictates the content of the "marital property rights to a spouse" identified in the first prong.

ERISA § 206(d)(3)(K), defining "alternate payee," can also be construed in a manner consistent with this reading. Under this subsection, the phrase "spouse

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[42] Plan administrators generally make the first determination as to whether a domestic relations order meets the requirements of a QDRO, but courts have held that such a determination may be also be made by any "court of competent jurisdiction," including a state court. *See Mack v. Kuckenmeister*, 619 F.3d 1010, 49 EBC 1818 (9th Cir. 2010) (holding that a state court has subject matter jurisdiction to determine whether a domestic relations order qualifies as a QDRO, even where the plan administrator has not yet had an opportunity to opine). *But see DOL QDRO Manual*, Q&A 1-13 ("It is the view of the Department of Labor that a state court (or other state agency or instrumentality with the authority to issue domestic relations orders) does not have jurisdiction to determine whether an issued domestic relations order constitutes a "qualified domestic relations order." In the view of the Department, jurisdiction to challenge a plan administrator's decision about the qualified status of an order lies exclusively in Federal court.").

[43] *See also Owens v. Automotive Machinists Pension Trust*, 551 F.3d 1138, 45 EBC 2153 (9th Cir. 2009) (domestic relations order involving a common law marriage, issued pursuant to Washington's treatment of quasi-marital relationships for purposes of dividing marital property, relates to "marital property rights" under ERISA § 206(d)(3)(B)). Note that in *Owens*, the plaintiff did not argue that she qualified as an alternate payee because she was a "spouse" under Washington law. Rather, the plaintiff was an "alternate payee" because she was a "dependent" of the participant through their 30-year quasi-marital relationship. *Id.*

[44] *Blue,* 160 F.3d at 385.

[45] *See* ERISA § 206(d)(3)(C) and (D), 29 U.S.C. § 1056(d)(3)(C) and (D).

[46] Reducing the administrative burden on plans is one of ERISA's core concerns, but it is not clear which side of the argument is more in keeping with this principle. There are potential administrative costs associated with both the acceptance and rejection of same-sex QDROs. It is difficult at this point to tell which position is more efficient in terms of plan administration, since much depends on how the various provisions that relate to QDRO administration develop. In the short term, this very uncertainty poses an administrative burden. In several contexts, it is not clear whether the same administrative rules that apply to opposite-sex alternate payees would fit same-sex alternate payees. For example, Treas. Reg. § 1.401(a)(9)-8, Q&A-6 discusses the circumstances under which an alternate payee is to be treated as having a separate account for the purposes of the required minimum distribution rules. Similarly, Proposed Treas. Reg. § 1.415(a)-1(f)(5) provides that the benefit limitations of I.R.C. § 415 will not apply separately to the participant and the "alternate payee." Without official guidance, it is not clear whether same-sex alternate payees can be treated the same as opposite-sex alternate payees under these provisions. However, these issues could be resolved over time. In the long term, deference to state law determinations of spousal status relieves plans of the responsibility to investigate possible same-sex orders and provoke litigation, enabling a more uniform system of QDRO administration. *See, e.g. Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9, 8 EBC 1729 (1987) ("The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing states. A plan would be required to keep certain records in some states but not in others; to make certain benefits available in some states but not in others; to process claims in a certain way in some states but not in others; and to comply with certain fiduciary standards in some states but not in others.").

[47] ERISA § 206(d)(3)(B)(ii), 29 U.S.C. § 1056(d)(3)(B)(ii).

[48] *Egelhoff*, 532 U.S. at 144.

[49] The sons of the deceased non-participant spouse in *Boggs* did not argue that their mother's testamentary transfer of community property interests constituted a QDRO, but rather that their mother, by operation of community property law, could bequeath her right to future distributions. *Boggs*, 520 U.S. at 848.

. . .who is recognized by a domestic relations order" means that recognition by a state court memorialized in a domestic relations order is the defining characteristic of what constitutes a "spouse" for the narrow purposes of a QDRO. Interposing federal law into the definition of an "alternate payee" under § 206(d)(3)(K) is not in harmony with § 206(d)(3)(B) and does not respect the recognized allocation of authority built into the QDRO provisions.

This view also finds support in several Department of Labor advisory opinions. In a letter issued in 1992, prior to the passage of DOMA, the DOL addressed the issue of a court-approved property division prior to granting an annulment *ab initio* of the marriage between the parties.[50] The plan administrator requested advice from the DOL as to whether an individual in an annulled marriage could be considered a "former spouse" under ERISA's QDRO provisions. The DOL responded that:

> (I)t is the view of the Department that the plan administrator is not in a position to review the correctness of a determination by a competent state authority under state domestic relations law that an individual is a "spouse," "former spouse," "child" or "other dependent" of the participant. Rather, the plan administrator must exercise reasonable care to determine that the state authority which issued the order had jurisdiction over such matters, and that the order issued was in accordance with the applicable state domestic relations law. Further, in notifying the participant upon receipt of the order, the plan administrator should clarify the limited scope of his or her inquiry as to the order's validity and inform the participant and each alternate payee under the order that it is his or her responsibility to challenge the correctness or validity of such an order.[51]

This advisory opinion suggests that the DOL believes the definition of "spouse, former spouse, child, or dependent" is a matter of state law, and it is neither proper nor practical for the plan administrator to weigh in on this issue. As the DOL stated in the same letter:

> (T)o the extent the Order was executed by a court of competent jurisdiction pursuant to Michigan domestic relations law, neither the determination under the Order that Y is a "former spouse," and thus meets the requirements to be an "alternate payee" for purposes of section 206(d)(3)(B) of ERISA, nor the determination that Y is the "surviving spouse" for purposes of section 206(d)(3)(F) of ERISA, are subject to review by the plan administrator.[52]

While this opinion was issued prior to the passage of DOMA, and the DOL has not addressed the application of DOMA to these provisions, a later advisory opinion indicates that this basic conceptual framework still applies.[53] In a letter issued in 1999, the DOL addressed the responsibilities of plan administrators in dealing with suspected "sham orders."[54] The plan administrator had received sixteen suspicious domestic relations orders from the same lawyer within a short period of time, all of which called for 100 percent assignment of pension benefits to the "former spouse," and all of which listed the alternate payee as residing at the same address as the participant.[55] The plan administrator's suspicions were confirmed when he learned of a pamphlet circulating among employees called the "retirement liberation handbook," which outlined numerous schemes to extract early distribution of benefits, some of which were remarkably consistent with the sham orders the administrator had received.[56] The DOL responded by confirming the continuing applicability of Advisory Opinion 92-17A, but adding that a plan administrator's fiduciary responsibilities might require him/her to bring evidence to the attention of the state authority that issued the order:

> (I)f the plan administrator has received evidence calling into question the validity of an order relating to marital property rights under state domestic relations law, the plan administrator is not free to ignore that information. Information indicating that an order was fraudulently obtained calls into question whether the order was issued pursuant to state domestic relations law, and therefore whether the order is a "domestic relations order" under section 206(d)(3)(C). When made aware of such evidence, the administrator must take reasonable steps to determine its credibility. If the administrator determines that the evidence is credible, the administrator must decide how best to resolve the question of the validity of the order without inappropriately spending plan assets or inappropriately involving the plan in the state domestic relations proceeding.[57]

However, the DOL emphasized that the plan administrator's duties in this regard were limited to pointing out the evidence to the state authority, and that the issuance of a domestic relations order ultimately remains the sole province of the state:

> If, however, the administrator is unable to obtain a response from the court or agency within a reasonable time, the administrator may not independently determine that the order is not valid under state law and therefore is not a "domestic relations order" under section 206(d)(3)(C), but should rather proceed with the determination of whether the order is a QDRO.[58]

These DOL opinions support the finality of state law determinations under ERISA § 206(d)(3)(B). Historically, this provision has been understood to look exclusively to state law for its content, and decisions at the state level are not to be second-guessed by the plan administrator. The plan administrator is required to take domestic relations orders at face value (or, at most, bring a possible error to the attention of the state authority). A proponent of QDRO rights for same-sex spouses therefore has a strong argument that ERISA

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[50] DOL Advisory Opinion 92-17A (Aug. 21, 1992).
[51] *Id.*
[52] *Id.*
[53] However, the DOL's reading of § 206(d)(3)(F) may require at least partial revision in light of DOMA, because of the possibility of a subsequent opposite-sex spouse's conflicting federal rights under ERISA § 205. *See infra* note 83.
[54] DOL Advisory Opinion 99-13A (Sept. 29, 1999).
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*

requires a plan administrator to defer to state domestic relations law in determining who is an "alternate payee" under ERISA § 206(d)(3)(B).

Alteration of Federal Law

A third argument against the recognition of domestic relations orders involving divorced same-sex spouses is based on ERISA § 514(d), which states that "(n)othing in this title[59] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States."[60] Under this argument, deference to state domestic relations law under § 206(d)(3)(B) effectively alters or modifies DOMA. DOMA, by its terms, applies to *all* federal laws, regulations and administrative rulings. A reading of ERISA that purports to find an exception to DOMA's sweeping application would alter a federal law, and this is therefore inconsistent with § 514(d). Section 514(d) thus functions to make the DOMA definition of "spouse" superior to the previous state-supplied definition.[61]

A proponent of QDRO rights for same-sex spouses would argue, however, that Section 514(d) is not applicable because DOMA is not altered or modified through the application of § 206(d)(3)(B). Thus, the final step in the argument in favor of recognition of domestic relations orders involving divorced same-sex spouses is that DOMA, by its own language, is not triggered where federal law has expressly deferred to state law to resolve a particular issue.

The definition of "spouse" supplied by § 3 of DOMA applies when "determining the meaning of any Act of Congress."[62] As discussed above, a strong argument can be made that the QDRO provisions make determination of spousal status under § 206(d)(3)(B) the exclusive province of state domestic relations law. Therefore, there is no opportunity to "determin[e] the meaning" of the word "spouse" when reading this particular section of ERISA. State courts and state judges are the only ones "determining the meaning" of the word "spouse," and when they do so, they are, as ERISA dictates, determining the meaning of state law, not federal law.[63]

Further, litigants who ask a federal court or plan administrator to determine whether someone is a "spouse" are rebuffed,[64] and the DOL admonishes plan administrators *not* to determine whether a QDRO complies with this portion of ERISA, even in the face of possible fraud.[65] Thus, this crucial first step of DOMA § 3—"determining the meaning" of federal law—is never triggered, and so deferring to state domestic relations law pursuant to § 206(d)(3)(B) does not result in an alteration of DOMA.

In most other contexts, of course, construing the word "spouse," requires "determining the meaning" of federal law. A plan administrator, for instance, must know whether a plan participant is married in order to know whether the participant's "spouse" is entitled to a joint and survivor annuity.[66] Here, since the plan administrator is bound by ERISA and ERISA does not direct him/her to look elsewhere, it is necessary to determine the meaning of the word "spouse" under federal law. Similarly, when assessing the tax return of a plan participant, the IRS will determine that the participant and not the alternate payee is taxable on QDRO payments unless the alternate payee is a "spouse" underI.R.C. § 402(e)(1)(A).[67] Here again, the IRS agent is applying an independent provision of the tax code and must construe the word "spouse" anew. Unlike the QDRO provisions, § 402(e)(1)(A) does not provide that "spouse" is determined according to state domestic relations law.[68] In the absence of federal authority, the IRS has traditionally looked to state law to resolve issues of marriage

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[59] Referring to Title I of ERISA, which contains the bulk of ERISA's substantive requirements, including § 206(d) and the QDRO provisions.

[60] ERISA § 514(d), 29 U.S.C. § 1144(d).

[61] A related argument is that DOMA should trump ERISA under the canon of *lex posterior derogat legi priori*: where two statutes are in conflict, the statute that was last in time controls. However, ERISA § 514(d) makes this doctrine irrelevant, since ERISA cannot alter or amend another federal statute even if ERISA was first in time. The issue, therefore, cannot be resolved on the basis of which provision came first. The question is whether or not DOMA is triggered by ERISA § 206(d)(3)(B), and the sequence of the two statutes is not useful in this regard.

[62] DOMA § 3, 1 U.S.C. § 7.

[63] *Mack v. Kuckenmeister*, 619 F.3d 1010, 49 EBC 1818 (9th Cir. 2010); *cf. Tkachik v. Comerica Inc.*, 40 EBC 1952 (E.D. Mich. 2006), *aff'd* 268 Fed.Appx. 443 (6th Cir. 2008)("ERISA does not define the term 'spouse.' When a statute leaves a term undefined and the term has an 'accumulated settled meaning' under the common law, there is a presumption that Congress meant to incorporate the common law definition into the statute."). *Tkachik* held that the federal common law definition of "surviving spouse" controls over a state law that defined "surviving spouse" as a term of art under the state probate code. *Id.* at 1958-1959. However, this holding does not suggest that federal common law should apply to the definition of "spouse" in the context of the QDRO provisions. First, the court was careful to state that federal common law only explained the general concept of the term "surviving spouse"—it is still state law that determines *who* is a spouse. *Id.* at 1959. Second, resort to federal common law to determine that "spouse" only applies to opposite-sex spouses is not appropriate, since DOMA, a federal statute, deals with this question. If DOMA does not resolve the issue, it is because Congress has expressly made "the application of the federal act dependent on state law," in which case federal common law would also be inapplicable. *Id.* at 1958, *quoting Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989).

[64] *See, e.g., Blue,* 160 F.3d at 385.

[65] DOL Advisory Opinion 99-13A (Sept. 29, 1999).

[66] ERISA § 205, 29 U.S.C. § 1055.

[67] I.R.C. § 402(e)(1)(A) ("For purposes of subsection (a) and section 72, an alternate payee who is the spouse or former spouse of the participant shall be treated as the distributee of any distribution or payment made to the alternate payee under a qualified domestic relations order (as defined in section 414(p))."

[68] I.R.C. § 402(e)(1)(A) does defer partially to the QDRO provisions, but this section requires an extra level of federal determination even after the payment is determined to be a QDRO. It is not sufficient that the taxpayer is an "alternate payee," which is all that a QDRO requires. He or she must also be a spouse or former spouse as those terms are used in I.R.C. § 402(e)(1)(A), a particular type of alternate payee.

and spouse.[69] However, in the context of I.R.C. § 402(e)(1)(A), DOMA provides an authority where there had previously been none, so federal law clearly applies.[70]

The QDRO provisions are designed to function differently. The plan administrator has no opportunity or obligation to determine the spousal rights of an individual named in a domestic relations order. This portion of the process is, for all intents and purposes, over before it reaches the plan administrator.

Furthermore, to read DOMA as altered or modified under ERISA § 514(d), where ERISA itself suggests DOMA should not apply, would be an unusually aggressive use of § 514(d).[71] Unlike the many federal enforcement regimes that ERISA would throw into hopeless confusion without § 514(d),[72] DOMA has no independent function outside of the federal statutes, regulations, and administrative rulings it supplements. To argue that ERISA § 206(d)(3)(B) makes DOMA inapplicable is quite different from an alteration of modification.

A Clash of Policies

Perhaps the most compelling argument against deferring to state domestic relations law in the case of a same-sex QDRO rests on the sheer force of DOMA's language. Congress has spoken strongly and unequivocally, with the clear intention of banishing any recognition of same-sex marriage from "any Act of Congress, . . . any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States."[73] Surely, the argument goes, any interpretation of a federal statute that opens the door to some form of recognition of same-sex marriage flies in the face of this congressional intent.

However, this issue involves an interpretation of two statutes rather than just one. Congress has spoken with clarity in ERISA's QDRO provisions as well, and a strong argument can be made that the policy concerns underlying the QDRO provisions are more directly implicated by the problem of same-sex QDROs than the policy concerns underlying DOMA.

REA added the key spousal rights provisions to ERISA.[74] ERISA § 205 generally requires that nonparticipant spouses have waivable rights to survivorship annuities; that is, actuarially adjusted pensions paid upon the death of the participant spouse.[75] ERISA § 206(d)(3) contains the QDRO provisions.

The policy concerns underlying the QDRO provisions are unambiguous, and differ somewhat from the concerns that gave rise to the survivor annuity provisions. Rather than creating a federally mandated level of spousal rights, Congress's primary goal in the QDRO provisions was to end confusion in the courts by excluding from preemption treatment property settlements among divorced spouses, while setting conditions that minimized the burden on plan administrators.

Prior to REA, the most problematic area of ERISA preemption involved alimony, child support, or marital property decrees that sought to reach pension assets.[76] The problem at the time was stark. Due to ERISA's broad preemption clause and to the general prohibition against alienation and assignment of benefits in ERISA § 206(d)(1), it would have appeared that alimony, child support, or marital property decrees should have been preempted, which would have left divorced spouses shut out of a major source of marital property to which a state court had decided they were entitled. Many federal courts strongly resisted this inequitable result, searching for any statutory ambiguity that would allow these traditional state powers to be preserved.[77] Congress provided a simple solution that, as discussed above, resolved the issue in a way that largely preserves determinations under state law: there is no preemption of state alimony, child support, or marital property decrees so long as the administrative requirements of a QDRO are satisfied.[78]

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[69] Rev. Rul. 58-66, 1958-1 C.B. 60.

[70] The IRS has indeed taken this approach in similar contexts. *See, e.g.*, Priv. Ltr. Rul. 200524017 (Mar. 17, 2005) (DOMA controls over Rev. Rul. 58-66 for the purposes of spousal provisions of I.R.C. § 457, relating to state and local government pension plans).

[71] The Supreme Court has cautioned against aggressive use of ERISA § 514(d). *See Shaw v. Delta Airlines*, 463 U.S. 85, 104, 4 EBC 1593 (1983)("ERISA's structure and legislative history, while not particularly illuminating with respect to ERISA § 514(d), caution against applying it too expansively."). *See also Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365, 11 EBC 2337 (1990) (refusing to imply an exception to the anti-alienation provisions of ERISA § 206(d)(1) even though not doing so would be counter to federal labor law).

[72] For instance, the National Labor Relations Act requires good faith bargaining over terms and conditions of employment, which inevitably includes the terms of pension and welfare benefit plans. 29 U.S.C. § 158(d). Without ERISA § 514(d), such a requirement might be preempted. *See, e.g., Murphy v. Heppenstall Co.*, 635 F.2d 233, 2 EBC 1891 (3d Cir. 1980) (NLRA and federal common law of labor relations not preempted by ERISA). Various federal employment discrimination laws are another important area saved by ERISA § 514(d). *See, e.g., Nemeth v. Clark*, 677 F.Supp. 899, 9 EBC 2117 (W.D. Mich. 1987) (ADEA not preempted by ERISA).

[73] DOMA § 3, 1 U.S.C. § 7.

[74] Prior to REA, ERISA required pension plans payable in annuity form to provide for a joint and survivor annuity option, but whether or not to elect this option was left entirely to the choice of the participant. ERISA § 205(c)(1); 29 U.S.C. § 1055(c)(1) (1982).

[75] ERISA § 205, 29 U.S.C. § 1055.

[76] John H. Langbein & Bruce A. Wolk, *Pension and Employee Benefit Law* 521 (3d ed. 2000).

[77] *See, e.g., American Telephone & Telegraph Co. v. Merry*, 592 F.2d 118, 1 EBC 1585 (2d Cir. 1979)(finding an implied exception to ERISA § 514(a) and ERISA § 206(d)(1) where wife sought to garnish husband's pension funds to enforce alimony and child-support obligations).

[78] ERISA § 514(b)(7), 29 U.S.C. § 1144(b)(7) and ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3). *See also* S. Rep. No. 98-575, at 19 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2565 ("The Committee believes that the spendthrift rules should be clarified by

In contrast, the qualified pre-retirement survivor annuity ("QPSA") and qualified joint and survivor annuity ("QJSA") provisions are aimed at providing all spouses with affirmative *federal* rights. As to the QPSA rights provided for under REA, the Senate Report states that "the Committee believes that it is appropriate to provide automatic survivor benefits to the spouses of vested participants."[79] Similarly, with respect to the QJSA rights, the Senate Report states that "(t)he Committee believes that a spouse should be involved in making choices with respect to retirement income on which the spouse may also rely."[80] The QPSA and QJSA provisions reflect the policy preferences of federal, rather than state, lawmakers.

Of course, the QDRO provisions also provide for a kind of spousal protection, but in a distinct way from the QPSA and QJSA provisions. The QDRO provisions protect only those spouses whom a state court has deemed worthy of protection under state law, while the QPSA and QJSA provisions provide broad-based protection to *all* (opposite-sex)[81] spouses.[82] Therefore, there is no contradiction in the argument that DOMA forecloses the rights of gay spouses to QPSA and QJSA rights, while leaving undisturbed the state law rights of divorced gay spouses as determined under state law.[83] The QPSA and QJSA provisions grant federal protection to everyone the federal government considers a "spouse," which clearly cannot mean same-sex spouses, while the QDRO provisions are aimed at preserving a particular aspect of state domestic relations law, which can indeed extend recognition to same-sex spouses.

Congress's intent is not nearly as clear with respect to the issue of applying DOMA to the unique case of QDROs. Aside from the conflict of laws issue addressed in DOMA § 2,[84] Congress's purpose in defining "marriage" and "spouse" in DOMA § 3, as reflected in the House Report, was to foreclose extension of federal "rights" and "benefits" to homosexual partners.[85] The rights that enable a spouse to qualify for a QDRO are best understood as *state* rights or benefits rather than *federal* rights or benefits, and this is exemplified both in the legislative history of DOMA and in the text and structure of ERISA § 206(d)(3).

The House Report suggests that in passing § 3 of DOMA, Congress sought mainly to preserve the preferential status given to heterosexual marriage and to avoid the imposition of new burdens on the federal government and on entities regulated by the federal government that would result from an extension of entitlements based on state recognized same-sex marriage. This concern was prompted by a decision from the Hawaii Supreme Court holding that denial of marriage rights to same-sex couples violated Hawaii's Constitution.[86] In proclaiming recognition of same-sex marriage banished from federal law, Congress did not seek generally to disrupt the internal workings of state domestic relations law:

> With regard to federal law, a decision by one state to authorize same-sex marriage would raise the issue of whether such couples are entitled to federal benefits that depend on marital status. H.R. 3396 anticipates these complicated questions by laying down clear rules to guide their resolution, *and it does so in a manner that preserves each state's ability to decide the underlying policy issue however it chooses* (emphasis added).[87]

The House Report goes on to explain that "a redefinition of marriage in Hawaii to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits."[88] Congress pointed to two typical, albeit non-exclusive, examples of what they meant by "rights and benefits."[89] The first involved increased educational benefits that would be available to veterans under 38 U.S.C. § 103(c) if same-sex spouses were deemed to be "dependents" under the federal statute:[90] a "benefit" in the sense of a direct

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creating a limited exception that permits benefits under a pension, etc., plan to be divided under certain circumstances. In order to provide rational rules for plan administrators, the Committee believes it is necessary to establish guidelines for determining whether the exception to the spendthrift rules applies. In addition, the Committee believes that conforming changes to the ERISA preemption provision are necessary to ensure that only those orders that are excepted from the spendthrift provision are not preempted.")

[79] S. Rep. No. 98-575, at 12 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2558.

[80] *Id.*

[81] DOMA § 3, 1 U.S.C. § 7.

[82] This is not a novel observation. *See* John H. Langbein & Bruce A. Wolk, *Pension and Employee Benefit Law* 587 (3d ed. 2000) ("In the QJSA and QPSA, [REA] imposes new substantive entitlements for the nonemployee spouse as a matter of federal law. By contrast, in dealing with the pension consequences of dissolution on divorce, [REA] defers strongly to state law.").

[83] The interplay between ERISA §§ 205 and 206(d)(3) does produce an interesting consequence in § 206(d)(3)(F), which allows a QDRO to treat a "former spouse" as a "surviving spouse" for the purposes of § 205 survivorship rights. In the highly improbable event that a participant divorces a same-sex spouse and then marries an opposite-sex spouse, the opposite-sex spouse's survivorship rights would conflict with the same-sex spouse's rights under § 206(d)(3)(F), since the portion of the participant's pension diverted to the same-sex spouse pursuant to the QDRO would diminish the share of the pension available to pay the surviving opposite-sex spouse. It is not clear how a court would resolve this conflict, although presumably the plan would not be forced to pay the full benefit to both the same-sex spouse and the opposite-sex spouse.

[84] DOMA § 2, 28 U.S.C. § 1738C ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

[85] H.R. Rep. No. 104-664, at 10-11 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2914-2915.

[86] *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

[87] H.R. Rep. No. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

[88] *Id.* at 10, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2914-2915.

[89] *Id.* at 10-11, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2914-2915.

[90] *Id.* at 11, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2915.

outlay from the government. The second example involved the right to employment leave for spousal care under the Family and Medical Leave Act:[91] a "right" in the sense of an entitlement mandated to be borne by one's employer. It is these federal rights and benefits that "promote, protect, and prefer the institution of [heterosexual] marriage."[92]

The rights provided for in the QDRO provisions resemble neither of these "rights" nor "benefits." ERISA § 206(d)(3) is not a benefit paid for by the government,[93] and does not generate extra benefits to be paid by the employer.[94] It simply directs how and to whom the total pension benefits are to be paid. Moreover, ERISA § 206(d)(3)(B) explicitly enshrines state domestic relations law, and is meant to *relieve* plans of the administrative burden of making legal judgments about the validity of state divorce decrees. Therefore, a claimant seeking enforcement of a same-sex domestic relations order has a strong argument that § 206(d)(3) is best understood as a recognition of state law rights, rather than a federal right or benefit that Congress sought to foreclose through DOMA.

Conclusion

Given a statute as broad and sweeping as DOMA, it may seem counterintuitive that ERISA could recognize the QDRO rights of same-sex spouses. Plan trustees and administrators may be understandably reluctant to embrace such an interpretation. However, there are strong arguments that the QDRO provisions were drafted to preserve state domestic relations law in situations like this. Due consideration should be given to these arguments, and divorced same-sex spouses should not hesitate to assert their rights.

In the absence of clear authority from courts, the DOL or the IRS, this situation undoubtedly puts plans in a difficult position. If a plan declines to honor a same-sex QDRO, the former spouse could sue to enforce his/her rights under the domestic relations order. If, on the other hand, a plan honors a same-sex QDRO, the participant could sue to enforce his/rights under § 206(d)(1), the anti-alienation provisions. Moreover, if the IRS concludes that a same-sex domestic relations order does not constitute a QDRO, the IRS could determine that the plan is no longer qualified pursuant to the Code's anti-alienation provisions at § 401(a)(13). These risks can be mitigated by seeking formal guidance from the DOL and IRS, although it seems likely that in many cases plans will end up being sued by one or more of the parties involved. Hopefully, as more light gets shed on this issue and courts have a chance to weigh in, a consensus will emerge.

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[91] *Id.* at 11, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2915.

[92] *Id.* at 18, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2922.

[93] It can be argued that the same-sex spouses who would benefit from the QDRO provisions do indeed get a benefit that imposes a cost on the federal government: the benefit of tax-deferral. The interpretation advocated by proponents of QDRO rights for same-sex spouses would enable the same-sex spouse to have access to a significant stream of future income with no present tax due, resulting in a "tax expenditure" by the government. However, the benefit here is significantly more limited than the benefit opposite-sex spouses get, and would not generally result in a tax expenditure. Once benefits commence payment, the same-sex spouse would be taxed under I.R.C. § 72 just like any other taxpayer receiving a taxable annuity. Further, the same-sex spouse would generally not be eligible to roll over the QDRO distributions into an individual retirement account, since I.R.C. § 402(e)(1)(B) applies only to alternate payees who are "spouses" or "former spouses," and this provision requires a federal interpretation of the meaning of "spouse." The only period of tax-deferral would be between the approval of the QDRO and commencement of benefits, but this benefit should not cost the government any revenue that it would not have lost anyway if the same-sex spouse were not eligible for a QDRO. If QDRO treatment were to be denied on these grounds, that portion of the money that would have gone to the non-employee spouse would remain part of the employee-spouse's pension, and would thereby remain deferred. Putting aside fact-specific matters such as age and tax bracket that would make a difference in individual cases, the federal government in general should not gain or lose significant revenue from this "benefit."

[94] The survivor annuity provisions share the characteristic of being generally cost-free to the employer and plan (aside from administrative costs), but since these are broad-based federal rights applied to all "spouses," these must be understood as part of the federal project of promoting, protecting and preferring heterosexual marriage.