DIVIDING PENSIONS AND OTHER EMPLOYEE BENEFITS

in California Divorces

INITIAL PROCEDURES & PRETRIAL ORDERS

Marshall S. Zolla
Deborah Elizabeth Zolla

California Continuing Education of the Bar

2

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§2.1 I. SCOPE OF CHAPTER

This chapter discusses procedural matters, including the need for court orders, during the initial phases of a dissolution proceeding that involves a division of employee benefits as community property. The chapter focuses on pension and retirement plan benefits, and particularly benefits that are subject to the Employee Retirement Income Security Act of 1974 (ERISA) (29 USC §§1001–1461). The chapter includes discussion of jurisdictional issues, notices that should be provided to employee benefit plans, joinder of a plan to the proceeding, pretrial orders that may be necessary, including restraining orders, and motions to set an alternate valuation date and to bifurcate a trial.

Thorough consideration of the type and nature of employee benefits should be part of a family lawyer's initial checklist in a marital dissolution proceeding (see chap 1). This chapter will help counsel for both a plan participant (employee spouse) and nonparticipant (nonemployee spouse) address benefit issues before settlement or trial, when there is still an opportunity to take advantage of essential protections and to correctly ascertain the nature and value of various benefits, elections, and beneficiary designations.

§2.2 II. JURISDICTIONAL ISSUES

A family law court must have jurisdiction to issue an order or judgment that determines the parties' respective community and separate interests in employee benefits and that directly binds the parties. See generally *Muckle v Superior Court (Muckle)* (2002) 102 CA4th 218, 225, 125 CR2d 303; *Marriage of Gray* (1988) 204 CA3d 1239, 1252 n7, 251 CR 856. A particularly important issue is a court's power to issue and enforce injunctive and benefit division orders directly against a plan, which in turn implicates the issue of joinder (see §§2.12–2.17).

§2.3 A. Subject Matter and Personal Jurisdiction in General

In general, "jurisdiction" to adjudicate matters in a marital dissolution case requires that a court have the following (see *Muckle v Superior Court (Muckle)* (2002) 102 CA4th 218, 225, 125 CR2d 303):

- Authority to adjudicate the specific matter raised by the pleadings (subject matter jurisdiction) (Fam C §2010);
- "In rem" jurisdiction over the marriage, which is the "res" in the proceeding (see *Marriage of Zirenberg* (1992) 11 CA4th 1436, 1444, 16 CR2d 238); and
- Personal ("in personam") jurisdiction over the parties to adjudicate personal rights and obligations, including property rights (see CCP §410.10; *Burnham v Superior Court* (1990) 495 US 604, 109 L Ed 2d 631, 110 S Ct 2105; *Marriage of Fitzgerald & King* (1995) 39 CA4th 1419, 1425, 46 CR2d 558).

In dissolution proceedings, the family law court has subject matter jurisdiction to make orders affecting interests in community estate assets, including employee benefits. See Fam C §§200, 2010(e). In general, a California superior court may exercise subject matter and personal jurisdiction if doing so comports with the "minimum

contacts" standard of *International Shoe Co. v Washington* (1945) 326 US 310, 316, 90 L Ed 95, 66 S Ct 154. *Shaffer v Heitner* (1977) 433 US 186, 212, 53 L Ed 2d 683, 97 S Ct 2569. See *Burnham v Superior Court* (1990) 495 US 604, 621, 109 L Ed 2d 631, 110 S Ct 2105 (discussing overlapping concepts of in personam and quasi–in rem jurisdiction).

For a special jurisdictional rule regarding adjudicating interests in military retirement benefits, see §2.5. On rules for residency of a party within California and within a county in order to bring a dissolution proceeding, see Fam C §2320. On general subject matter and personal jurisdiction in dissolution proceedings, see Practice Under the California Family Code: Dissolution, Legal Separation, Nullity, chap 4 (Cal CEB Annual).

§2.4 B. Effect of Jurisdictional Statutes and Need for Court Jurisdiction Over Employee Benefit Plan

Apart from the general rules of jurisdiction that affect a court's ability to adjudicate interests in community assets (see §2.3), counsel must also determine whether any specialized jurisdictional issues are involved with respect to employee benefits. Often, this determination requires resolution of the following questions:

- Is there a statute that specifically pertains to a court's jurisdiction over the type of benefits involved or employee involved, as in the case of military servicemembers (see §2.5 and chap 17)?
- Will the involved employee benefit plan recognize and implement a benefits division simply if specific statutory requirements of form and process are met, or only if the court acquires direct jurisdiction over the plan, such as through joinder (see §§2.12–2.17)?

§2.5 1. Effect of Jurisdictional Statutes

A California court's jurisdiction to determine the parties' interests in employee benefits on dissolution may be affected by statutes that provide jurisdictional requirements unique to the type of employment involved. The most prominent example of this concerns jurisdiction over military servicemembers. Under federal law, at least one of the following bases must exist for personal jurisdiction over a servicemember (10 USC §1408(c)(4); *Marriage of Hattis* (1987) 196 CA3d 1162, 1167, 242 CR 410):

- Residence (other than because of military assignment);

- Domicile; or
- Consent.

PRACTICE TIP™ In addition to the personal jurisdiction requirements described above, military servicemembers are provided a variety of special considerations in litigation because of the unique demands and circumstances of military service. See, *e.g.*, 50 USC App §§501–596 (Servicemembers Civil Relief Act). For example, special consideration is provided by statute regarding modification of child custody and support orders when a servicemember (including reservists and National Guard members) are deployed out of state. Fam C §§3047, 3651, 3653, 17440, 17560. Although these statutes do not address employee benefits directly, counsel may wish to argue that their underlying public policy should compel freezing plan benefits that are disputed in a dissolution proceeding until a servicemember returns from deployment out of state.

§2.6 2. Need for Court Jurisdiction Over Employee Benefit Plan

A key issue in a dissolution proceeding that involves an adjudication of employee benefits is often whether direct jurisdiction over an employee benefit *plan* will be needed to assure plan and employee compliance with court orders pertaining to the benefits. In general, unless a plan has been joined as a party to a dissolution proceeding, a court lacks jurisdiction to *directly* enforce an order or judgment against that plan. Fam C §2060(b); *Marriage of Baker* (1988) 204 CA3d 206, 215, 251 CR 126. See, *e.g.*, Ed C §22656 (orders not binding on State Teachers' Retirement System (STRS) unless STRS joined as party and served with certified copy of order).

Joinder of a plan, therefore, gives the court the power to issue and enforce orders against the plan, and helps ensure that a nonemployee spouse's interest in the plan will not be dissipated before the plan is served with an appropriate order dividing the benefits—such as a qualified domestic relations order (QDRO) in the case of an ERISA-governed plan. 204 CA3d at 215. On a special exception to the need for plan joinder in the case of QDROs, and for further discussion of plan joinder, see §§2.13–2.17.

NOTE™ Failure to join an employee benefit plan as a party to a marital dissolution proceeding does not affect the court's power to adjudicate whether a nonemployee spouse has a community property interest in the plan—as between the spouses

themselves. See Fam C §755(b); *Marriage of Gowan* (1997) 54 CA4th 80, 91, 62 CR2d 453.

C. Removal to Federal Court and Exclusive or Concurrent Jurisdiction

§2.7 1. Background

The great majority of California family law cases that involve a division of employee benefits are adjudicated in the state superior court where they originate. In some cases, however, efforts have been made to remove a case to federal court, at the outset of the case or in a later phase, such as an enforcement proceeding.

Although individual spouses sometimes seek removal, employee benefit plans more commonly do so. Some plans, for example, have sought removal in order to resist *joinder* to the underlying proceeding. See *Nasca v Peoplesoft, Inc.* (ND Cal 1999) 87 F Supp 2d 967, 973. Parties (whether plans or spouses) have also sought removal in order to litigate the issue of federal preemption, when ERISA or another federal statute applies to the employee benefit involved (typically, a pension plan benefit). Preemption has been raised, for example, with respect to ERISA's antialienation provision and its provision preempting laws relating to private employee benefit plans. See 29 USC §1056(d)(1); *Boggs v Boggs* (1997) 520 US 833, 138 L Ed 2d 45, 117 S Ct 1754. The preemptive effect of such federal laws on state community property law is a critical factor in the division of employee benefits and is discussed more fully in chaps 5 and 7.

§2.8 2. Propriety of Removal; Concurrent Versus Exclusive Jurisdiction

Public policy. Public policy generally disfavors removal in domestic relations matters, which are traditionally state regulated. In general, when a claim sought to be joined in a marital action would be removable to federal court if sued on *alone, i.e.*, if a federal court would have original jurisdiction over it, either the claim or the entire action may be removed to federal court, within the discretion of that court. 28 USC §1441(c). As a matter of general public policy, however, removal of dissolution cases to federal court is discouraged because it is viewed as an interference with a traditional state function. Accordingly, federal courts have shown a tendency to avoid these areas of state power. See generally *In re Burrus* (1890) 136 US 586, 593, 34 L Ed 500, 10 S Ct 850 ("[t]he whole subject of the domestic relations of husband and wife . . . belong to the laws of the States and not to the laws of the United States"); *Buechold v Ortiz* (9th Cir 1968)

401 F2d 371, 373 ("[d]omestic relations is a field peculiarly suited to state regulation and control, and peculiarly unsuited to control by federal courts").

One federal court, for example, in a case decided before passage of the Retirement Equity Act of 1984 (REA) (Pub L 98–397, 98 Stat 1426), noted that the circumstances in which removal can be effected under §1441(c) are "notoriously rare." See *Marriage of Pardee* (DC 1976) 408 F Supp 666, 668 (wife's claim against trust for portion of husband's pension was not "separate and independent" from her claim for community property against husband, and facts and transactions needed to establish rights vis-à-vis husband were substantially identical to those needed to establish her rights vis-à-vis trust). But see *Stone v Stone* (DC 1978) 450 F Supp 919, 923 (in pre-REA case, declining to follow *Pardee* insofar as *Pardee* held federal claim not removable unless separate and independent from state claims, and finding it necessary to decide if nonemployee spouse had claim against plan on which relief may be granted under federal law). *Stone,* however, was found superseded by the REA on certain issues, in *Boggs v Boggs* (1997) 520 US 833, 849, 138 L Ed 2d 45, 117 S Ct 1754. Because much litigation in the employee benefits area has involved ERISA-related benefits, the discussion hereafter focuses on matters involving ERISA.

Concurrent versus exclusive federal jurisdiction in ERISA cases. In ERISA-related matters, a federal statute describes areas in which federal and state courts have concurrent jurisdiction and also areas in which federal courts have exclusive jurisdiction. 29 USC §1132. *Concurrent* jurisdiction under ERISA exists with respect to civil actions (29 USC §1132(a)(1)(B), (7)):

- Brought by a participant or beneficiary to recover benefits due to him or her under the terms of the plan, to enforce his or her rights under the terms of the plan, or to clarify his or her rights to future benefits under the terms of the plan; or
- Brought by a state to ensure compliance with a qualified medical child support order.

Note that for purposes of this discussion, only the first of these (29 USC §1132(a)(1)(B)) is pertinent to plan participants and beneficiaries.

Exclusive federal jurisdiction under ERISA, by contrast, exists as follows (29 USC §1132(e)(1)):

> . . . Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary,

> fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

For an example of a type of civil action governed by the exclusive federal jurisdiction provision, see 29 USC §1132(a)(3).

A series of pre-REA cases illustrates the emerging views on concurrent, versus exclusive, federal jurisdiction in ERISA benefit cases. The lesson from them appears to be that jurisdiction of original dissolution proceedings that involve a determination of community property rights in employee benefits lies in *state* court, and therefore such cases should not be removed to federal court (even if a plan is joined). But postdissolution actions to *enforce* an award against a plan, for example, potentially may involve federal jurisdiction (and removal) if adjudication of a federal claim is involved. In a 1976 decision, a California federal district court rejected a pension trust's efforts to remove a wife's dissolution action to federal court under 28 USC §1441(c), which permits removal of an entire case if a nonremovable claim is joined with a "separate and independent" claim that would be removable if sued on alone. The court found that the wife's claim against her husband's pension trust, which had been joined as a party to their dissolution, did not pose a cause of action against the trust that was "separate and independent" from her community property claim in the dissolution to enforce her interest in the pension. Further, the court stated that removal in this instance was an intolerable interference with traditional state functions, and determined that removal was improper. *Marriage of Pardee* (DC 1976) 408 F Supp 666, 668. And a California appellate court went further in stating that the California state courts have exclusive jurisdiction over domestic relations actions to determine the parties' rights in California property. See *Marriage of Lionberger* (1979) 97 CA3d 56, 62, 158 CR 535 (*rejecting* plan's claims that (1) federal court had exclusive jurisdiction under 29 USC §1132(e)(1) to "clarify, interpret, and apply" ERISA to retirement programs, and that (2) wife's dissolution action did not qualify under concurrent federal-state jurisdiction provision as action brought to "clarify rights under the terms of the plan," when it did qualify).

By contrast, in 1978, a pension plan successfully removed a wife's postdissolution enforcement action to federal court under 28 USC §1441(a), which authorizes removal of any state court civil action of which the district court has original jurisdiction. The court in that case found that exercising federal jurisdiction in an *enforcement* action against the plan did not violate the longstanding policy of avoiding intervention in state domestic relations law, given that proof of the

wife's claim did not require the court to intrude into that law. Although this court conceded that federal courts would lack jurisdiction over a suit by a nonemployee spouse to obtain management and control of a community asset (even if a plan were joined to the proceeding), in this enforcement case, removal was appropriate because the federal court would need to interpret only the prior divorce decree—a determination that involved state contract law more than community property laws. Further, the court concluded, it was necessary to decide whether the nonemployee (wife) had a federal claim against the plan, and federal courts lack jurisdiction to remand federal claims to state court when federal claims happen to be joined with state claims. *Stone v Stone* (DC 1978) 450 F Supp 919, 923. But see *Boggs v Boggs* (1997) 520 US 833, 849, 138 L Ed 2d 45, 117 S Ct 1754 (noting that *Stone* was superseded by REA on certain issues).

A more recent decision has explained that if federal jurisdiction is asserted on the basis of a federal question, removal is proper only if (1) the federal question appears on the face of a plaintiff's well-pleaded complaint, or (2) federal law so *completely preempts* the plaintiff's state law cause of action that the complaint necessarily arises under federal law. *Nasca v Peoplesoft, Inc.* (ND Cal 1999) 87 F Supp 2d 967, 970. In that decision, involving an ERISA-governed plan that sought removal after being joined to a dissolution case, a federal district court applied these principles and concluded as follows in remanding to the California family court and ordering the plan to pay the divorcing parties' attorney fees (*Nasca v Peoplesoft, Inc.* (ND Cal 1999) 87 F Supp 2d 967, 973):

- The common theme in cases in which courts *decline* to find complete ERISA preemption is that they involve disputes about the *ultimate ownership* of ERISA benefits, not their quality, nature, or existence;
- While 29 USC §1132(a) might facially encompass an action to join an ERISA-governed plan (like the one involved in the cited case), it does not implicate the goals or concerns embodied in ERISA;
- Joinder of an ERISA plan under California statutes is merely a precursor to the California state court issuing a domestic relations order, under which that court would allocate the pension benefits according to California property and family law.
- If the California state court, however, were to order the defendant (plan) to pay benefits to the plaintiffs in a manner that the defendant believed to be inconsistent with federal law, *i.e.*, if the domestic relations order (DRO) did not constitute a QDRO, the defendant might then have a valid claim that the state court order

was in conflict with federal law and that controversy might be removable under conflict preemption (see 29 USC §1132(e)); but until such a conflict is apparent, there is no question of ERISA interpretation and no basis for removal.

- When it enacted the Retirement Equity Act (REA), Congress sought to protect the rights of nonemployee spouses and dependents by allowing state courts to make equitable divisions of property in a divorce or dissolution; thus an interpretation of ERISA supporting removal to federal court in this type of case would frustrate that purpose by needlessly complicating the process by which a nonemployee spouse may obtain pension benefits.

Further, the California Supreme Court and appellate courts have held that state courts have subject matter jurisdiction concurrent with the federal courts in deciding whether a DRO is a QDRO, under 29 USC §1132(e)(1). *Marriage of Oddino* (1997) 16 C4th 67, 73, 65 CR2d 566; *Marriage of Levingston* (1993) 12 CA4th 1303, 1306, 16 CR2d 100.

§2.9 III. INFORMATIONAL REQUESTS AND NOTICES TO EMPLOYEE BENEFIT PLANS

Among the important initial steps in a dissolution proceeding that involves an adjudication of employee benefits is ascertaining information about the benefits and putting the benefit plan on notice of the nonemployee's potential interest in the benefits by means of a "notice of adverse interest." See Fam C §755(b).

§2.10 A. Requests for Information About Employee Benefit Plans

Obtaining information early in a dissolution matter about the identity of the parties' employee benefit plans and nature of plan benefits is crucial to protecting a party's community interest in those benefits. This importance is reflected in a statutory procedure that requires an employee's disclosure, on request, of certain information regarding his or her employee benefits (see Fam C §2062(c)), as discussed hereafter. Apart from facilitating the ultimate disposition of the benefits in a court proceeding, this information is needed to notify an employee benefit plan of a nonemployee spouse's interest in plan benefits (see §§2.9–2.11), and will help enable counsel for the nonemployee to anticipate the need to seek early court orders (see

§§2.20–2.23) to restrain a unilateral change or withdrawal of benefits in favor of the employee spouse.

Voluntary exchange of information. The parties themselves may have information about their own or each other's employee benefits, and a voluntary exchange of information at the outset of the case (including before actual filing of a court proceeding) can potentially yield significant data about them.

Mandatory disclosure of information. In addition, under Fam C §2062(c), within 30 days after receipt of a written request, an employee spouse must provide the nonemployee spouse with the name of each employee benefit plan that covers the employee spouse, along with the name, title, address, and telephone number of each plan's trustee, administrator, or agent for service of process. If necessary, the employee spouse must obtain the requested information from the plan or plan sponsor. Fam C §2062(c). Augmenting this requirement are the statutory provisions for mandatory disclosure of assets and obligations. See Fam C §§2103–2105; *Marriage of Brewer & Federici* (2001) 93 CA4th 1334, 1348, 113 CR2d 849.

Formal discovery. Absent voluntary cooperation by counsel for the employee spouse, the nonemployee spouse can proceed with formal discovery against the employee spouse or the plan administrator. For discussion of discovery, see chap 3. For related discussion of obtaining information about plans, see chap 1.

§2.11 B. Notice of Adverse Interest

By statute, a nonemployee spouse can put an employee benefit plan on notice of his or her interest in plan benefits by sending the plan a written notice of the nonemployee's interest. See Fam C §755(b). This type of notice has come to be known as a "notice of adverse interest." In general, without such a notice, a plan that distributes benefits only to the employee spouse is discharged from adverse claims. Fam C §755(b). Also, without such a notice, plan administrators, who have fiduciary duties to both employees and plan beneficiaries, simply may remain unaware of the existence of a nonemployee spouse's claim until much later, such as when the nonemployee seeks to obtain benefits from the plan. In addition, apprising the plan of the nonemployee's interest in plan benefits helps prevent a unilateral distribution or alteration of the benefits in favor of the employee spouse before the community interest in the benefits is adjudicated. See Fam C §755(b); *Marriage of Baker* (1988) 204 CA3d 206, 218, 251 CR 126.

PRACTICE TIP™ The easiest way for a nonemployee spouse to provide a notice of adverse interest is simply to deliver a letter

informing the plan that the parties are dissolving their marriage, that he or she claims an adverse interest in the employee spouse's plan benefits, and that pursuant to Fam C §755, no benefits should be distributed without prior agreement of the parties or a qualifying benefits division order, such as a QDRO. This notice should be sent at the beginning of a case by certified mail, return receipt requested.

For a sample notice of adverse interest form, see §2.33.

IV. JOINDER OF EMPLOYEE BENEFIT PLAN

§2.12 A. Overview of Joinder Issues

The need for joinder of an employee benefit plan as a party to a dissolution proceeding should be assessed as early as possible in the case. Counsel should investigate, for example, whether joinder is truly necessary to require the plan involved to honor a court order that adjudicates interests in plan benefits, or is otherwise advantageous to his or her client. See, *e.g.*, Ed C §22656 (court orders affecting State Teachers' Retirement System (STRS) not binding unless STRS joined as party and served with certified copy of order).

An important consideration is that by statute, no order or judgment in a marital action is technically enforceable against an employee benefit plan unless the plan has been joined to the proceeding. Fam C §2060(b). Further, a court has authority to require joinder as a condition of granting a judgment that bifurcates the termination of marital status from other issues in the case. Fam C §2337(c)(6)(A).

Even without joinder, however, certain plans must honor a court order that divides benefits if it meets the statutory requirements of a QDRO; and plans of federal public entities generally refuse joinder and have their own requirements for recognition of state family law orders. For discussion, see §§2.13–2.14.

B. Application of Joinder Rules to Particular Plans

§2.13 1. ERISA-Governed Plans

Despite the Family Code provisions that authorize joinder of employee benefit plans (Fam C §§2060(b), 2337(c)(6)(A)), federal law provides that an ERISA-governed plan must honor the terms of a domestic relations order that divides plan benefits if it meets the requirements for "qualification" prescribed by federal statute (*i.e.*, that it can be deemed a QDRO). See 29 USC §1056(d)(3). Thus, a QDRO

must be honored *regardless* of whether the plan has been joined. And conversely, the plan *need not* honor an order dividing plan benefits if the order does not meet the standards of a QDRO even if the plan *has been joined.* See *Marriage of Baker* (1988) 204 CA3d 206, 218, 251 CR 126. See also *Trustees of Dirs. Guild v Tise* (9th Cir 2000) 234 F3d 415 n2 (citing *Baker*), as amended at 255 F3d 661.

On the other hand, an important benefit of joinder is that it gives a court jurisdiction to make orders directly against a plan, *e.g.,* orders (*Marriage of Baker* (1988) 204 CA3d 206, 219, 251 CR 126):

- To restrain the plan from distributing or honoring an elective change in pension or retirement benefits in favor of the employee spouse before issuance of a QDRO; or
- To make an award of attorney fees against a plan when appropriate. But see *AT&T Mgmt. Pension Plan v Tucker* (CD Cal 1995) 902 F Supp 1168, 1178 (plan administrator's refusal to qualify domestic relations order as QDRO cannot be grounds for attorney fee award against it).

Joinder may also help ensure that issues concerning a benefits division that might not be identified by the marital parties but are otherwise important will be raised, such as the nature of a unique benefit and conditions that must be met to receive it.

CAUTION™ Some plans have threatened to remove a case to federal court when faced with possible joinder, but in at least one reported case, the federal court dismissed the matter and remanded to state court, as discussed in §§2.7–2.8. *Nasca v Peoplesoft, Inc.* (ND Cal 1999) 87 F Supp 2d 967, 973. On the potential issue of federal preemption of California's provisions for notice of adverse interest and joinder (Fam C §§755, 2060–2074) given the United States Supreme Court's broad view of the reach of ERISA (*Boggs v Boggs* (1997) 520 US 833, 844, 138 L Ed 2d 45, 117 S Ct 1754), see §7.4.

PRACTICE TIP™ While service of a joinder summons and related pleadings gives notice to a plan administrator of a nonemployee spouse's claim, it is important to give written notice of adverse interest under Fam C §755 and to follow any procedures put in place by the plan. Such notice is crucial to ensure that the plan restricts activity such as withdrawals, distributions, and loans. This is especially important in cases in which the parties' marriage is already terminated and the employee spouse has met the conditions for a distribution—although, ideally, any QDROs should already be in place by the time marital status is terminated.

§2.14 2. California and Federal Government Plans

California public entities. Certain California governmental and other public entity plans such as the Public Employees' Retirement System (CalPERS) (Govt C §§20000–21703), which operates under the Government Code, and the State Teachers' Retirement System (CalSTRS) (Ed C §§22000–25115), which operates under the Education Code, require joinder as a condition of complying with an order against the plan. Fam C §2060(b). In general, they are cooperative in responding to requests for joinder. Similarly, most city and municipal plans operating in California require joinder and will cooperate with counsel. For in-depth discussion of these plans, see chaps 12–14.

Federal public entities. Federal governmental plans such as the Federal Employees' Retirement System (FERS), Civil Service Retirement System (CSRS), Federal Thrift Savings Plan, and plans of the various military services—all of which are governed by the United States Code—appear to take the position that federal law puts them beyond the reach of joinder in state domestic relations matters. Accordingly, these plans generally will reject any attempt to "join" them to a state court proceeding, or to otherwise restrict benefit activity as a result of having been given notice.

PRACTICE TIP™ Because these federal plans are "nonjoinable," as a practical matter counsel will need to provide a notice of adverse interest (see Fam C §755(b)) and follow the specific procedures described in the federal statutes and regulations with respect to the particular plan involved. On federal employee benefits, see chaps 15–18.

C. Joinder Procedure

§2.15 1. Application and Order for Joinder

The procedure for joinder of an employee benefit plan is relatively simple. No formal motion is required. Instead, on written application by a party to a family law proceeding, the clerk *must* enter an order joining as a party to the proceeding any employee benefit plan in which either party claims an interest that is or may be subject to disposition by the court. Fam C §2060(a); *Marriage of Baker* (1988) 204 CA3d 206, 215, 251 CR 126.

The forms to be prepared as part of the application process include the following:

- Request for Joinder of Employee Benefit Plan and Order (Judicial Council Form FL-372) (see §2.29);

- Pleading on Joinder—Employee Benefit Plan (Judicial Council Form FL-370) (see §2.30); and
- Summons (Joinder) (Judicial Council Form FL-375) (see §2.31).

When preparing these forms, counsel should be careful to name the plan correctly. Many plans incorporate the names of the employer in their formal names; however, the plan is a legal entity separate from the employer. Use of the employer's name instead of the plan's name may result in ineffective joinder of the plan as a party. After completing these forms, counsel should submit them to the clerk in the department where the marital dissolution case is pending.

On receiving the required joinder forms, the clerk will file the request and pleading, issue a summons, and return it to counsel for service on the plan.

The overall procedure for joinder is one of the most commonly used procedures by family law practitioners in marital dissolution cases. It places no burden on a plan, because mere service of an order of joinder, along with the other Judicial Council forms referenced above, does not require the plan to do anything except withhold payment of benefits claimed by the nonemployee spouse pending receipt of an order dividing benefits, such as a QDRO. 204 CA3d at 219.

§2.16 2. Service of Joinder Order and Related Papers

Under the statutory procedure to join an employee benefit plan, counsel for a moving party is required to serve the following documents on the plan (Fam C §2062(a)):

- A copy of the pleading on joinder;
- A copy of the request for joinder and order of joinder;
- A copy of the summons (joinder); and
- A blank copy of the Notice of Appearance and Response of Employee Benefit Plan (Judicial Council Form FL-374) (see §2.32).

These documents may be served in the same manner as for general service of papers. Effective service on the plan may be made by serving the summons on a trustee or administrator of the plan in its capacity as trustee or administrator, or on an agent designated by the plan for service of process in its capacity as agent. Fam C §2062(b). On the duty of an employee spouse to furnish identifying information about the plan, its trustee, administrator, or agent after a written request for this information, see §2.10 and Fam C §2062(c).

§2.17 3. Employee Benefit Plan's Response

Within 30 days of the date of the service on an employee benefit plan, the plan *must* file and serve a copy of the Notice of Appearance and Response of Employee Benefit Plan (Judicial Council Form FL-374) on the party requesting joinder. Fam C §2063(a). The plan *may* also serve a responsive pleading along with its Notice of Appearance. If the plan does not file a responsive pleading (but does file its Notice of Appearance), all statements of fact and requests for relief contained in any pleading served on the plan are deemed to be refuted by the plan's Notice of Appearance. Fam C §2063(b).

PRACTICE TIP™ Normally, a plan does not file a responsive pleading in addition to the Notice of Appearance, but awaits issuance of a court order directing the distribution of the benefits.

If the plan does not file or serve a Notice of Appearance and Response within the time prescribed by statute and has not filed a motion to quash the summons or a petition for writ of mandate, the clerk, on written application of the party requesting joinder, must enter the default of the employee benefit plan. Fam C §2065.

V. CONFIRMING HOLD ON BENEFITS AND ANTICIPATING TRIGGERING EVENTS

§2.18 A. Confirming Hold on Benefits

Many employee benefit plans (including ERISA-governed and state and local governmental plans) will acknowledge the existence of a hold on an employee's benefits once the plans have received either written notice of a nonemployee's interest or joinder-related pleadings. Ideally, a practitioner who gives notice to a plan will obtain written confirmation from the plan administrator that a hold is in place and will not be released until the claim is resolved through issuance of a QDRO or similar benefits division order that is presented to the plan.

ERISA-governed employee benefit plans typically provide guidance on the procedures they follow after receiving notice of pending litigation involving an employee and his or her spouse. Sample language from qualified retirement plans is excerpted immediately below, illustrating *slightly different* practices with regard to administrative holds. In each example, it is assumed that any authority for placing a hold on benefits is derived from the plan's written documents that govern the plan's procedures.

EXAMPLE I™ On receipt of written notice of a pending domestic relations matter, a restriction will be placed on the participant's (*i.e.*, employee's) benefits in his or her plan or plans referenced

in the notice. The written notice restriction will remain in place for a period of 6 months; however, on receipt of a draft domestic relations order, court order, or joinder, the participant's benefit activity will be restricted for a period of 18 months from when benefits become payable. For defined contribution plans, no distributions, loans, or withdrawals from the participant's accounts affected by an order will be permitted until the earlier of 18 months from receipt of the order or when a qualified determination has been made.

EXAMPLE II™ On the plan administrator's receipt of any written notice of a pending domestic relations matter, a temporary restriction will be imposed on the participant's (*i.e.*, employee's) account so that, if available, no amounts will be paid from the plan for a period of 90 days. The restriction will automatically be removed at the end of the 90-day period and the participant will have complete access to the account unless the plan administrator receives a court-executed order that clearly indicates an allocation of benefits to a spouse, former spouse, or other dependent of the participant or a restraining order prohibiting the plan from disbursing funds to a participant. On the plan administrator's receipt of a restraining order, joinder to a court action, or court-executed domestic relations order, a restriction will be imposed on the participant's account for a period of 18 months so that no amounts will be paid from the plan unless otherwise directed by the court as a result of a restraining order.

PRACTICE TIP™ The practitioner should carefully document the date that he or she initiated joinder of an employee benefit plan or otherwise gave a written notice of adverse interest to the plan, and have evidence of the plan's receipt of that notice or proof of service. If the time for maintaining a hold is about to expire, many plans will extend the hold on written request and assurances that the claim is still being pursued.

If it is clear from the plan administrator's policy when a hold will be lifted, the practitioner should note that date in his or her calendar and seek to obtain an order assigning funds (such as a QDRO) or, if the plan as been joined, an order restraining the plan from disbursing funds, well in advance of that deadline. *Marriage of Baker* (1988) 204 CA3d 206, 219, 251 CR 126 (plan joinder required for restraining order against plan).

If a plan does not make it clear whether there is a hold on the employee's benefits, the assumption should be that there is no

restriction. In that case, the practitioner must weigh the potential hazards in light of the circumstances. This is the situation in which knowledge of the plan's rules regarding distributions, including payment on death of the employee, is essential.

§2.19 B. Anticipating "Triggering Events"

Certain events will trigger a distribution of benefits to an employee spouse. With respect to a defined contribution plan (*e.g.*, a "401(k)" or profit-sharing plan) the most common events that trigger a distribution include:

- The employee's termination of employment, death, disability, or separation from service;
- The termination of the plan without the establishment of a successor defined contribution plan (other than an employee stock ownership plan, or "ESOP"); and
- The participant's hardship, if permitted by the plan.

Spousal consent rules under ERISA protect a nonemployee spouse by requiring his or her consent to a change in beneficiary designation, as well as with respect to an employee loan in which the account is used as security for the debt, unless the total accrued benefit is $5000 or less. 29 USC §1055(c)(2), (4).

Spousal consent is not required, however, for a distribution from a *defined contribution* plan. Accordingly, if one of the above "triggering events" occurs, an employee could unilaterally take a distribution from the plan. For this reason, the practitioner may wish to consider seeking a restraining order against a plan that has been joined or a court order dividing and disposing of benefits before an overall judgment in the underlying dissolution case (see §§2.20–2.23).

In the case of a *defined benefit* plan, employees become entitled to a distribution of benefits on attaining a certain age and years of service. A typical defined benefit plan will permit an employee to receive a distribution as early as age 55 with 10 years of service. In some instances, employees with a long work history (*e.g.*, 25 years of service) may retire at any age. Also, employees who have established a disability may qualify for a disability pension before the earliest retirement age.

EXAMPLE™ Assume that a 45-year-old employee with a defined benefit plan is in dissolution litigation. The plan administrator has rejected joinder of the plan to the proceeding, claiming that ERISA preempts California state law and any attempt to restrict the benefits will be denied unless the plan receives a domestic

relations order signed by a judge that meets QDRO requirements. If the plan prohibits a distribution before the employee is age 55, and if the plan requires spousal consent for any distribution other than a joint and survivor annuity, the employee's spouse is protected even without joinder. Benefits cannot be distributed because the employee has not satisfied the age requirement. If the employee dies before meeting the age requirement, the nonemployee spouse will receive benefits as the employee's qualifying surviving spouse. This result would not follow, however, in a *postdissolution* matter in which the surviving spouse no longer qualifies. See *Samaroo v Samaroo* (3d Cir 1999) 193 F3d 185, 189; *Hopkins v AT&T Global Info. Solutions Co.* (4th Cir 1997) 105 F3d 153, 156. For this reason, many practitioners will not consent to a judgment terminating the marriage until a QDRO or similar order has been issued by the court.

§2.20 VI. SEEKING TEMPORARY RESTRAINING ORDERS AND QDROs

To help avert an employee spouse's improper self-dealing with respect to employee benefits before a dissolution judgment is issued, counsel should consider the need for temporary restraining orders and QDROs.

§2.21 A. Restraining Orders in Summons

The family law summons contains "automatic temporary restraining orders" (ATROs) that potentially provide some protection with respect to employee benefits. These orders become effective against a petitioner on issuance of the summons, and against a respondent on service of the summons and petition. See Fam C §§233, 2040. The ATROs, with limited exception, restrain the concealment and most unilateral transfers or other dispositions of property, as well as cancellations or beneficiary changes to health, life, or disability insurance, and changes to or creation of nonprobate property transfers without the written consent of the affected party or a court order. Fam C §2040(a)(2)–(4).

PRACTICE TIP™ Obtaining a more specific order or orders concerning the use and disposition of employee benefits is often desirable, however, because (1) ATROs do not bind third parties, unless they are joined to the proceeding, and (2) the general nature of the ATROs may lead some litigants to claim (truthfully

or not) that they did not understand the full scope of the ATROs or otherwise realize what they meant.

B. Restraining Orders After Hearing and Temporary QDROs

§2.22 1. Restraining Orders After Hearing

A party to a dissolution proceeding may apply to the court for an order restraining another party—usually the employee spouse, but also an employee benefit plan that has been *joined* as a party—from taking actions that would compromise the rights of the party seeking the order. See generally Fam C §2047(a). For example, an order might be sought to preclude the following actions:

- Changing (or permitting the change of) specific pension, health, disability, or life insurance beneficiaries under a plan; and
- Making (or permitting) unilateral withdrawals of specific pension benefits or elections that effectively alter the value or classification of the benefits under a plan to the detriment of the nonemployee spouse's potential community interest.

If an employee benefit plan has been joined to the proceeding, a restraining order directed to the plan will normally bind the plan. See ERISA §206(d) (29 USC §1056(d)).

Note that if an employee benefit plan has not yet been joined, or effectively cannot be joined (such as a federal governmental plan)—and therefore is not an actual party—counsel may still seek a restraining order against the *employee spouse*. See generally Fam C §2047(a).

A restraining order may be sought by means of an order to show cause or notice of motion. For a general discussion of these procedures, see Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §§11.15–11.20 (Cal CEB Annual).

§2.23 2. Temporary QDROs

A party may seek to have a family law court issue a temporary QDRO with respect to an ERISA-governed plan, and although that order technically is subject to "qualification," ERISA plans normally will place a temporary hold on the benefits even if the plan *has not* been joined as a party. See generally 29 USC §1056(d)(3)(H) (describing procedure plan must use for separately accounting for benefits while determining whether DRO is qualified).

NOTE™ If an ERISA-governed plan has been *joined* to the proceeding, a temporary restraining order issued against the plan may be cast in the form of a temporary QDRO, assuming that it otherwise meets the requirements of a QDRO (see chap 6). A notice of adverse interest should also be served on the plan, in any event (see §2.11). See Fam C §755(b).

Counsel should also keep in mind that in the case of plans that *are not* governed by ERISA, it is important to observe any procedural requirements (by statute, regulation, or simply established by the plan) that would affect a plan's obligation to place a hold on employee benefits pending the outcome of the case. In a particular case, this might involve obtaining a temporary order regarding the benefits and sending the plan a copy of that order.

NOTE™ In anticipation of the need to seek a temporary QDRO, counsel should research the specific benefits and terms of a party's employee benefit plan and be cognizant of its details. See, *e.g., Hamilton v Washington State Plumbing & Pipefitting Indus. Pension Plan* (9th Cir 2006) 433 F3d 1091, 1103 (dissolution decree required husband to name children as "beneficiaries under the pension in lieu of life insurance" without reference to surviving-spouse rights or details about benefits; but QDRO could not divest his later widow of right to qualified preretirement survivor annuity (QPSA)). Case law clearly illustrates the negative consequences of the failure to secure a temporary order. See, *e.g., Regents of Univ. of Cal. v Benford* (2005) 128 CA4th 867, 874, 27 CR3d 441 (nonemployee wife died 5 years into dissolution proceeding, before retirement benefits divided or marital status terminated).

VII. SPECIAL PRETRIAL ORDERS

§2.24 A. Alternate Valuation Date

Considering that employee benefits, and particularly pension and retirement benefits held in a fund, can and often do appreciate over time, the date of their valuation affects the value of the community interest. When dividing community property in a dissolution action, the court must generally value the assets and liabilities as near as practicable to the time of *trial*. Fam C §2552(a). An exception to this general rule is available to a party who can show, with good cause, that the use of an alternate valuation date will accomplish an equitable division of the community property. Fam C §2552(b).

In most cases, employee benefits will receive a "date of trial" valuation. Counsel should keep in mind, however, the following guidelines in applying this rule:

- In general, the purpose of the alternate valuation date provision is to remedy inequities such as those that may result when one spouse dissipates the community estate after separation, or when the effort and action of one spouse alone after separation greatly increases the value of the estate (*Marriage of Reuling* (1994) 23 CA4th 1428, 1435, 28 CR2d 726 (no abuse of discretion in valuing stock and stock options at time of trial under circumstances).
- For pension and retirement benefits, an appropriate date of valuation may be the date of trial or the date of payment of the benefits, depending on when a court actually divides the community interest in the benefits (*Marriage of Crook* (1992) 2 CA4th 1606, 1612, 3 CR2d 905; *Marriage of Marsden* (1982) 130 CA3d 426, 448, 181 CR 910). But the nature of the benefit and type of plan may justify a valuation as of the date of the parties' *separation,* such as with respect to a profit-sharing plan in which accounts can be clearly divided between pre- and postseparation contributions (see *Marriage of Behrens* (1982) 137 CA3d 562, 577, 187 CR 200 (only value of account at date of separation, together with any increase in value directly attributable to assets then in account, was subject to division as community property)).

Procedure. Assuming there is no stipulation to the alternate date, a party who seeks an alternate valuation date by motion must give at least 30 days' notice of the motion (or order to show cause) to the other party. Fam C §2552(b). The motion is made using the form Application for Separate Trial (Judicial Council Form FL-315). See §2.34.

The notice must include a declaration that states the following (see Cal Rules of Ct 5.126(b)):

- The proposed alternate valuation date;
- Whether the proposed alternate date will apply to all or only a portion of the benefits involved and, if only to a portion, each such benefit, separately identified; and
- The reasons supporting the alternate date.

§2.25 B. Bifurcation of Marital Status

Bifurcation of marital status is relatively common and seemingly straightforward. In the area of employee benefits, however, extra care

by the practitioner is required. The Family Code permits a court to impose numerous conditions if it grants a bifurcation of marital status to the moving party, some of which directly concern the preservation of employee benefits. Fam C §2337(c)(2), (5). In particular, until a judgment has been issued on all issues and is final, the court may order the moving party to do the following (Fam C §2337(c)(2), (5)):

- Maintain all existing health and medical insurance coverage for the other party and any minor children named as dependents, so long as he or she is legally able to do so (with provisions for extending this duty to that party's estate, and for indemnification of the other party if the moving party can no longer legally obtain insurance);
- Indemnify and hold the other party harmless from any adverse consequences relating to the other party if the bifurcation results in the loss of the other party's rights to pension benefits, elections, or survivors' benefits under the party's pension or retirement plan to the extent that the other party would have been entitled to those benefits or elections as the surviving spouse of the party.

In addition, the statute permits a court to require joinder of the party's retirement or pension plan before entry of a judgment terminating marital status; and if applicable, to require entry of an order under Fam C §2610 with reference to a defined benefit or similar plan pending the ultimate resolution of the distribution of benefits under the employee benefit plan. Fam C §2337(c)(6). Under §2610, with limited exception, a court must make whatever orders are necessary or appropriate to ensure that each party receives his or her full community property share in any retirement plan, including all survivor and death benefits. Fam C §2610(a).

NOTE™ Failure to join an employee benefit plan is often fatal to a request for bifurcation, and therefore joinder is the preferable safeguard. But if the plan is of a kind that, as a practical matter, *cannot* be joined—such as a federal governmental plan—counsel must follow the statutory requirements that pertain to giving notice of the proceeding to the plan, and plan procedures for securing the rights of the nonemployee. In requesting or opposing bifurcation conditions, counsel should keep in mind that imposition of the conditions is permissive, not mandatory. See Fam C §2337(c). Time limits (*e.g.*, for moving to bifurcate in relation to the ability of one party to maintain the other on health insurance policies or regarding the finality of a dissolution judgment on issues unrelated to benefits) also must not be

overlooked; statutory conditions, once imposed, continue until final judgment. Fam C §2337(c)(2), (5).

PRACTICE TIP™ The potential risk of bifurcation is illustrated in *Marriage of Allison* (1987) 189 CA3d 849, 853, 234 CR 671, in which the court entered a bifurcated dissolution judgment that only terminated the parties' marital status. In the period between the entry of this judgment and a later trial of remaining issues, the employee husband elected and took early retirement. Because he was not married on his date of retirement, he was able to elect a single life annuity form of payment without his former wife's consent. She challenged this election and ultimately prevailed in obtaining a court order against the employer to issue a joint and survivor annuity, under 29 USC §1055, to protect her in the event of her former husband's death. Absent the bifurcation of status, however, she would have either had to have consented in writing or had to have been protected by a QDRO. In that case, her former husband would have been prevented from unilaterally depriving her of her community property entitlement to a joint and survivor annuity, and she would have been spared the emotional and legal costs associated with recovering them.

Procedure. An application for bifurcation of marital status is normally made by a noticed motion. Fam C §2337(a). However, it also may be made by order to show cause, or the parties may stipulate to bifurcation. The motion is made using the form Application for Separate Trial (Judicial Council Form FL-315). See §2.34. A preliminary Declaration of Disclosure (Judicial Council Form FL-140) with a completed Schedule of Assets and Debts (Judicial Council Form FL-142) must be served by the moving party with the noticed motion, unless it has been previously served, or unless the parties stipulate in writing to defer service of the declaration of disclosure until a later time. Fam C §2337(b).

§2.26 VIII. CONSIDERATIONS FOR REGISTERED DOMESTIC PARTNERS

The passage of the Domestic Partner Rights and Responsibilities Act of 2003 (DPRRA), which became fully operative on January 1, 2005, has presented a myriad of novel issues regarding employment plan benefits. The legislation requires that registered domestic partners be treated as spouses for most purposes of state law (Fam C §297.5(a)), and their rights must be construed within the context of relevant federal law as well as employment plan terms. Employee

benefit plans are highly regulated, and the extent to which domestic partners are provided rights under benefit plans requires careful analysis by attorneys and plan administrators.

For an analysis of employee benefit rights of domestic partners, see California Domestic Partnerships, chap 8 (Cal CEB 2005).

IX. OTHER CONSIDERATIONS IN TAKING INITIAL ACTIONS

§2.27 A. Factors in Dealing With Employee Benefits and Benefit Plans

Some important principles may be distilled from case law in dealing with employee benefit plans:

- ERISA imposes a fiduciary duty on plan administrators to determine the rights of parties by looking *only* at a plan's documents, not at *extrinsic private agreements* between the parties (*McGowan v NJR Serv. Corp.* (3d Cir 2005) 423 F3d 241, 246);
- The death of a party during a dissolution, but before a division and distribution of employee benefits under a QDRO, can potentially lead to a loss of benefits to the nonemployee spouse and those who might take under a will or by intestacy from that spouse. Therefore, it is imperative to seek an early QDRO to protect the nonemployee spouse's interest (see *Regents of Univ. of Cal. v Benford* (2005) 128 CA4th 867, 876, 27 CR3d 441); and
- Even with a QDRO, the parties' intent may be thwarted if the drafter does not fully understand the benefits payable under the plan before attempting to direct them (see, *e.g., Hamilton v Washington State Plumbing & Pipefitting Indus. Pension Plan* (9th Cir 2006) 433 F3d 1091, 1103 (QDRO could not divest surviving spouse of right to QPSA unless QDRO *expressly* assigned surviving-spouse rights to former spouse).

For further discussion of QDROs, see chap 6.

PRACTICE TIP™ Preservation of the community interest of the nonemployee spouse in employee benefits should be an immediate concern of the nonemployee spouse's lawyer. The employee spouse's concerns, often overlooked, must also be addressed. If the employee spouse is already receiving retirement plan benefits at the time a dissolution proceeding is commenced, his or her lawyer should advise the client that dissolution proceedings might disrupt the flow of benefit payments, particularly when the plan receives notice of adverse interest (Fam C §755) or a formal request for joinder of the plan.

§2.28 B. Keeping Settlement in Mind While Taking Initial Actions

Although resolution of community property interests in employee benefits can be a contentious and lengthy process, it is important from the outset of a case for counsel to consider the benefits of settling those interests and reaching a comprehensive marital settlement agreement (see chap 4). To that end, it is worthwhile to take into account "lessons learned" from a number of key decisions:

- Avoid the tendency of some family law attorneys to not handle employee benefits issues in their cases and simply seek to "reserve jurisdiction" to decide them at some future time. It may be malpractice for counsel to simply agree to a blanket, open-ended reservation of the court's jurisdiction to adjudicate the parties' interests and not provide a method of division (including by an allocation of community and separate interests). See *Marriage of Bergman* (1985) 168 CA3d 742, 758, 214 CR 661.
- Seek to carefully identify all employee benefits subject to division as community property and ensure that the same degree of clarity and precision is used in drafting a stipulated judgment or marital settlement agreement that pertains to them. Some courts may take a broad view of what an "omitted" benefit is, and therefore be willing to grant generous postjudgment relief if some benefit is overlooked. See *Marriage of Melton* (1994) 28 CA4th 931, 33 CR2d 761 (when pension turns out to be far greater than amounts stated in judgment, excess may be treated as omitted asset). However, other courts may not be so willing, and a party to an agreement that inadvertently omits an important benefit might be unable to later secure it by moving to set aside the earlier agreement and judgment. See, *e.g., Marriage of Simundza* (2004) 121 CA4th 1513, 18 CR3d 377 (holding that parties expressly agreed to unequal division by which wife would receive stated amount for stated time, distinguishing *Melton,* and finding no omitted asset).
- Carefully think through the tax consequences of anticipated withdrawals or distributions of assets from an employee benefit plan that later will be memorialized in a marital settlement agreement, and enlist the assistance of qualified tax practitioners in understanding those consequences. See, *e.g., Laura D. Seidel,* TC Memo 2005–67 (parties incurred additional tax liability after withdrawal from 401(k) plan). In addition, consider the importance of properly characterizing payments as a property settlement or as spousal support, because an improper characterization can have unintended and unfavorable tax

consequences. See, *e.g.*, *Robert E. Reichner*, TC Summary Opinion 2006–50 (payments to former spouse characterized in divorce decree as "property settlement" could not receive alimony tax treatment).

- Do not rely on a purported waiver in a premarital agreement of future rights to a community share of pension benefits or to waive a joint and survivor annuity. Federal law provides that a plan participant and spouse must be married to each other at the time such benefits are waived. Treas Reg §1.401(a)–20, Q&A 28; *Hurwitz v Sher* (1992) 982 F2d 778, 781.
- Include review of beneficiary designations as a key step in identifying and settling interests in employee benefits. Do not assume that a beneficiary designation in employee benefit plan documents will automatically be revoked as the result of a marital dissolution, especially with respect to ERISA-governed benefits. See *Egelhoff v Egelhoff* (2001) 532 US 141, 149 L Ed 2d 264, 121 S Ct 1322 (state statute purporting to automatically revoke nonprobate transfers on divorce was preempted by ERISA, and plan was entitled to rely on beneficiary designation in plan documents).

X. FORMS

§2.29 A. Form: Request for Joinder of Employee Benefit Plan and Order (Judicial Council Form FL-372)

FL-372

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar no., and address):	FOR COURT USE ONLY
TELEPHONE NO.: FAX NO. (Optional): E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
MARRIAGE OF PETITIONER: RESPONDENT:	
CLAIMANT:	
REQUEST FOR JOINDER OF EMPLOYEE BENEFIT PLAN AND ORDER	CASE NUMBER:

TO THE CLERK

1. Please join as a party claimant to this proceeding *(specify name of employee benefit plan)*:

2. The pleading on joinder is submitted with this application for filing.

Dated:

▶ _____

(SIGNATURE OF ☐ ATTORNEY FOR) ☐ PETITIONER ☐ RESPONDENT

_____

(TYPE OR PRINT NAME)

ORDER OF JOINDER

3. IT IS ORDERED
   a. The claimant listed in item 1 is joined as a party claimant to this proceeding.
   b. The pleading on joinder be filed.
   c. Summons be issued.
   d. Claimant be served with a copy of the pleading on joinder, a copy of this request for joinder and order, the summons, and a blank *Notice of Appearance and Response of Employee Benefit Plan* (form FL-374).

Dated: Clerk, By _____, Deputy

Page 1 of 1

Form Adopted for Mandatory Use Judicial Council of California FL-372 [Rev. January 1, 2005]

REQUEST FOR JOINDER OF EMPLOYEE BENEFIT PLAN AND ORDER

Family Code, §§ 2610, 2021, 2060–2063, 2070–2074 www.courtinfo.ca.gov

§2.30 B. Form: Pleading on Joinder—Employee Benefit Plan (Judicial Council Form FL-370)

FL-370

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):	FOR COURT USE ONLY
TELEPHONE NO.: FAX NO. (Optional): E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
MARRIAGE OF PETITIONER: RESPONDENT:	
CLAIMANT:	
PLEADING ON JOINDER—EMPLOYEE BENEFIT PLAN	CASE NUMBER:

TO THE CLAIMANT: You have been joined as a party claimant in this proceeding because an interest is claimed in the employee benefit plan that is or may be subject to disposition by this court. The party who obtained the order for your joinder declares:

1. Information concerning the employee covered by the plan:
   a. Name:
   b. Employer *(name)*:
   c. ☐ Name of labor union representing employee:
   d. ☐ Employee identification number:
   e. Other *(specify)*:

2. Petitioner's
   a. ☐ Attorney *(name, address, and telephone number)*:

   b. ☐ Address and telephone number, if unrepresented by an attorney:

3. Respondent's
   a. ☐ Attorney *(name, address, and telephone number)*:

   b. Address and telephone number, if unrepresented by an attorney:

PETITIONER: RESPONDENT:	CASE NUMBER:

4. Petition for dissolution ☐ and response states
   a. Date of marriage:
   b. Date of separation:

5. ☐ Response states
   a. Date of marriage:
   b. Date of separation:

6. Judgment
   a. ☐ has not been entered
   b. ☐ was entered on *(date)*:
      (1) ☐ and disposes of each spouse's interest in the employee benefit plan.
      (2) ☐ and does not dispose of each spouse's interest in the employee benefit plan.

7. The following relief is sought:
   a. ☐ An order determining the nature and extent of both employee and nonemployee spouse's interest in employee's benefits under the plan.
   b. ☐ An order restraining claimant from making benefit payments to employee spouse pending the determination and disposition of nonemployee spouse's interest, if any, in employee's benefits under the plan.
   c. ☐ An order directing claimant to notify nonemployee spouse when benefits under the plan first become payable to employee.
   d. ☐ An order directing claimant to make payment to nonemployee spouse of said spouse's interest in employee's benefits under the plan when they become payable to employee.
   e. ☐ Other *(specify)*:

f. Such other orders as may be appropriate.

Dated:

▶ _____
(SIGNATURE OF ☐ ATTORNEY FOR) ☐ PETITIONER ☐ RESPONDENT

_____
(TYPE OR PRINT NAME)

§2.31 C. Form: Summons (Joinder) (Judicial Council Form FL-375)

FL-375

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):	FOR COURT USE ONLY
TELEPHONE NO. (Optional): FAX NO. (Optional): E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
MARRIAGE OF PETITIONER: RESPONDENT:	
CLAIMANT:	
SUMMONS (JOINDER)	CASE NUMBER:

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

If you wish to seek the advice of an attorney in this matter, you should do so promptly so that your response or pleading, if any, may be filed on time.

¡AVISO! Usted ha sido demandado. El tribunal puede decidir contra Ud. sin audiencia a menos que Ud. responda dentro de 30 días. Lea la información que sigue.

Si Usted desea solicitar el consejo de un abogado en este asunto, debería hacerlo inmediatamente, de esta manera, su respuesta o alegación, si hay alguna, puede ser registrada a tiempo.

1. ☐ TO THE ☐ PETITIONER ☐ RESPONDENT ☐ CLAIMANT
A pleading has been filed under an order joining *(name of claimant):*

as a party in this proceeding. If you fail to file an appropriate pleading within 30 days of the date this summons is served on you, your default may be entered and the court may enter a judgment containing the relief requested in the pleading, court costs, and such other relief as may be granted by the court, which could result in the garnishment of wages, taking of money or property, or other relief.

2. ☐ TO THE CLAIMANT EMPLOYEE BENEFIT PLAN
A pleading on joinder has been filed under the clerk's order joining *(name of employee benefit plan):*

as a party claimant in this proceeding. If the employee benefit plan fails to file an appropriate pleading within 30 days of the date this summons is served on it, a default may be entered and the court may enter a judgment containing the relief requested.

Dated: Clerk, By _____ _____, Deputy

(SEAL)

3. NOTICE TO THE PERSON SERVED: You are served
a. ☐ As an individual.
b. ☐ As (or on behalf of) the person sued under the fictitious name of:
c. ☐ On behalf of:

Under: ☐ CCP 416.10 (Corporation) ☐ CCP 416.60 (Minor)
☐ CCP 416.20 (Defunct Corporation) ☐ CCP 416.70 (Incompetent)
☐ CCP 416.40 (Association or Partnership) ☐ CCP 416.90 (Individual)
☐ Other: ☐ FC 2062 (Employee Benefit Plan)

d. ☐ By personal delivery on *(date):*

Form Adopted for Mandatory Use
Judicial Council of California
FL-375 [Rev. January 1, 2003]

SUMMONS (JOINDER)

www.courtinfo.ca.gov

PROOF OF SERVICE—SUMMONS (JOINDER)
(Use separate proof of service for each person served)

1. I served the
   a. *Summons and (1)* ☐ *Request for Joinder of Employee Benefit Plan and Order, Pleading on Joinder-Employee Benefit Plan, blank Notice of Appearance and Response of Employee Benefit Plan*
      (2) ☐ *Notice of Motion and Declaration for Joinder* (3) ☐ Order re Joinder
      (4) ☐ *Pleading on Joinder* (specify title):
      (5) ☐ Other:
   b. On *(name of party or claimant):*
   c. By serving (1) ☐ Party or claimant. (2) ☐ Other *(name and title or relationship to person served):*
   d. ☐ By delivery at ☐ home ☐ business (1) Date of:
      (2) Time of: (3) Address:
   e. ☐ By mailing (1) Date of: (2) Place of:
2. Manner of service: *(check proper box)*
   a. ☐ **Personal service.** By personally delivering copies. (CCP 415.10)
   b. ☐ **Substituted service on corporation, unincorporated association (including partnership), or public entity.** By leaving, during usual office hours, copies in the office of the person served with the person who apparently was in charge and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 41 5.20(a))
   c. ☐ **Substituted service on natural person, minor, incompetent, or candidate.** By leaving copies at the dwelling house, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of the office or place of business, at least 18 years of age, who was informed of the general nature of the papers, and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 415.20(b)) **(Attach separate declaration or affidavit stating acts relied on to establish reasonable diligence in first attempting personal service.)**
   d. ☐ **Mail and acknowledgment service.** By mailing (by first-class mail or airmail) copies to the person served, together with two copies of the form of notice and acknowledgment and a return envelope, postage prepaid, addressed to the sender. (CCP 415.30) **(Attach completed acknowledgment of receipt.)**
   e. ☐ **Certified or registered mail service.** By mailing to address outside California (by registered or certified airmail with return receipt requested) copies to the person served. (CCP 415.40) **(Attach signed return receipt or other evidence of actual delivery to the person served.)**
   f. ☐ Other *(specify code section):*
      ☐ Additional page is attached.
3. The notice to the person served (item 3 on the copy of the summons served) was completed as follows (CCP 412.30, 415.10, and 474):
   a. ☐ As an individual.
   b. ☐ As the person sued under the fictitious name of:
   c. ☐ On behalf of:
      Under: ☐ CCP 416.10 (Corporation) ☐ CCP 416.60 (Minor)
      ☐ CCP 416.20 (Defunct Corporation) ☐ CCP 416.70 (Incompetent)
      ☐ CCP 416.40 (Association or partnership) ☐ CCP 416.90 (Individual)
      ☐ FC 2062 (Employee Benefit Plan)
   d. By personal delivery on *(date):*
4. At the time of service I was at least 18 years of age and not a party to this action.
5. Fee for service: $ . . . . . .
6. Person serving
   a. ☐ Not a registered California process server.
   b. ☐ Registered California process server.
   c. ☐ Exempt from registration under Bus. & Prof. Code 22350(b).
   d. ☐ California sheriff, marshal, or constable.
   e. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on *(date):* at *(place):* , California.

(Signature)

(For California sheriff, marshal, or constable use only)
I certify that the foregoing is true and correct and that this certificate is executed on *(date):* at *(place):* , California.

(Signature)

FL-375 [Rev. January 1, 2003] **SUMMONS (JOINDER)** Page 2 of 2

6. Person serving
   a. ☐ Not a registered California process server.
   b. ☐ Registered California process server.
   c. ☐ Exempt from registration under Bus. & Prof. Code 22350(b).
   d. ☐ California sheriff, marshal, or constable.
   e. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on *(date):* at *(place):* , California.

(Signature)

(For California sheriff, marshal, or constable use only)
I certify that the foregoing is true and correct and that this certificate is executed on *(date):* at *(place):* , California.

(Signature)

FL-375 [Rev. January 1, 2003] **SUMMONS (JOINDER)** Page 2 of 2

§2.32 D. Form: Notice of Appearance and Response of Employee Benefit Plan (Judicial Council Form FL-374)

FL-374

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number and address):	FOR COURT USE ONLY
TELEPHONE NO. (Optional): FAX NO. (Optional): E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
MARRIAGE OF PETITIONER: RESPONDENT:	
CLAIMANT:	CASE NUMBER:
NOTICE OF APPEARANCE ☐ AND RESPONSE OF EMPLOYEE BENEFIT PLAN	

1. An appearance in this proceeding is entered by claimant employee benefit plan *(name)*:

2. Service on claimant may be made as follows

   a. ☐ Attorney for claimant *(name, address, and telephone number)*:

   b. ☐ Other *(name, title, address, and telephone number)*:

3. ☐ Claimant responds to the pleading on joinder and states that the allegations of the pleadings are

   a. ☐ correct

   b. ☐ incorrect as set forth in ☐ attachment 3b or ☐ as follows *(specify)*:

Dated:

Claimant

By

(TYPE OR PRINT NAME) (SIGNATURE)

Page 1 of 1

Form Adopted for Mandatory Use Judicial Council of California FL-374 [Rev. January 1, 2003]

NOTICE OF APPEARANCE AND RESPONSE OF EMPLOYEE BENEFIT PLAN

Family Code, §§ 80, 2010, 2021, 2060–2063, 2070–2074 www.courtinfo.ca.gov

§2.33 E. Form: Sample Letter Notice of Adverse Interest

Date: _ _ _ _ _ _

BY CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

_ _[*Name*]_ _, Director of Retirement Plans

_ _[*Name of organization and address*]_ _

Re: _ _[*Name of employee spouse; personnel ID No.*]_ _

_ _[*Name of retirement plan*]_ _

_ _[*Name of case*]_ _, **Dissolution of Marriage**

_ _[*Court name and case number*]_ _

This letter is a Notice of Adverse Interest. It is provided to you in accordance with California Family Code §755, because you are the designated Trustee for the above-referenced retirement plan.

The parties in the above-referenced proceeding are in the process of dissolving their marriage. Our client, _ _[*name of nonparticipant spouse*]_ _**, claims an adverse interest in the above-referenced retirement plan benefits held in the name of** _ _[*his/her*]_ _ **spouse,** _ _[*name of participant spouse*]_ _**. Pursuant to California Family Code §755, you are hereby advised that no retirement or other employee benefits should be distributed without prior written agreement of the parties or a Qualified Domestic Relations Order ("QDRO").**

Pursuant to California Family Code §755, this Notice of Adverse Interest is sent to you to prevent _ _[*name of participant spouse*]_ _**, or you, from improperly removing plan benefits before the community interest in those benefits is appropriately adjudicated. As Trustee for the above-referenced employee benefit plan, you owe a fiduciary duty to our client.**

_ _[*Name of organization managing plan benefits*]_ _ **may be held liable for any distributions made from the retirement plan in violation of our client's community property interest.**

Accordingly, _ _[*name of organization managing plan benefits*]_ _ **is required to maintain and preserve the parties' interests in the above-referenced company retirement plans until further notice or Court Order.**

Should you have any questions or concerns regarding the foregoing, please do not hesitate to contact our office.

Very truly yours,

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

cc: _ _[*Client's name*]_ _
_ _[*Opposing counsel's name*]_ _

§2.34 F. Form: Application for Separate Trial (Judicial Council Form FL-315)

FL-315

PETITIONER: RESPONDENT: OTHER:	CASE NUMBER:

APPLICATION FOR SEPARATE TRIAL

Attachment to ☐ Order to Show Cause (form FL-300) ☐ Notice of Motion (form FL-301)

I, *(name)*: , request that the court sever (bifurcate) and grant an early and separate trial on the following issue or issues:

1. a. ☐ Dissolution of the status of the marriage (Fam. Code, § 2337).
I will serve with this application my preliminary *Declaration of Disclosure* and completed *Schedule of Assets and Debts* unless they have been previously served or the parties have stipulated in writing to defer service.
b. ☐ I request the following conditions be made:
(1) ☐ That I indemnify and hold the other party harmless from "taxes, reassessments, interest, and penalties" payable in the event that a dissolution prior to the property division results in taxes that would not have been payable if the parties were still married at the time of the division.
(2) ☐ That I maintain health and medical insurance for the other party and minor children as long as possible, and then must obtain comparable coverage or pay any expenses that would have been covered by insurance.
(3) ☐ That I hold the other party harmless re probate homestead.
(4) ☐ That I hold the other party harmless re probate family allowance.
(5) ☐ That I hold the other party harmless re pension benefits, elections, or survivors' benefits.
(6) ☐ That I join the pension plan and, if the other party has a private plan covered by ERISA, will cause a Qualified Domestic Relations Order (QDRO) to be served on the plan.
(7) ☐ That I hold the other party harmless re social security benefits.
(8) ☐ Any other condition that the court determines is just and equitable.

2. ☐ Permanent custody and visitation of the children of the marriage.

3. ☐ Date of separation of the parties.

4. ☐ Alternate valuation date for property.

5. ☐ Validity of marital settlement agreement entered into prior to or during the marriage.

6. ☐ Other *(specify)*:

7. a. ☐ I request that the court conduct this separate trial on the hearing date.
or
b. ☐ I will, at the hearing, ask the court to set a date for this separate trial.

8. The reasons in support of this request are *(specify)*:
☐ Points and authorities attached. ☐ Supporting declarations attached.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

Form Adopted for Mandatory Use Judicial Council of California FL-315 [Rev. January 1, 2002]

APPLICATION FOR SEPARATE TRIAL (Family Law)

Page 1 of 1 Family Code, § 2337

§2.35 G. Form: Sample Letter to Opposing Counsel Requesting Employee Benefit Plan Information

Date: _ _ _ _ _ _

BY U.S. MAIL

_ _[*Name of opposing counsel*]_ _
_ _[*Opposing counsel's address*]_ _

Re: _ _[*Name of case*]_ _, **Dissolution of Marriage**
_ _[*Court name and case number*]_ _

Dear _ _[*name of opposing counsel*]_ _:

I represent _ _[*name of client*]_ _ **in the above-entitled matter. As we ascertain the parties' assets for division, it is imperative that we identify any existing retirement benefit plans governed by** _ _[*specify, e.g., the Employee Retirement Income Security Act of 1974 ("ERISA") (29 USC §§1001–1461)*]_ _**. Pursuant to Family Code §2062(c), please provide us, within thirty (30) days of this request, written verification of the name of each of** _ _[*name of participant spouse's*]_ _ **employee benefit plans, and the title, address, and telephone number of the trustee, administrator, or agent for service of process for each plan.**

To accomplish a proper division of retirement plans governed by _ _[*specify, e.g., ERISA*]_ _**, each plan must be joined in this proceeding, pursuant to Family Code §2060; as such, a** _ _[*specify form of order, e.g., Qualified Domestic Relations Order ("QDRO")*]_ _ **will need to be prepared for each plan. We will need to file and serve each plan administrator with a Request for Joinder of Employee Benefit Plan and Order; Pleading on Joinder—Employee Benefit Plan; and Summons (Joinder). Accordingly, we will appreciate your response to our request for any and all plan information.**

Thank you for your continuing professional courtesy and cooperation.

Very truly yours,

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

cc: _ _[*Client's name*]_ _