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A Power Struggle of Mythic Proportion: In the World of ERISA are Retirement Plan Administrators the Real Gods of Olympus?

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A POWER STRUGGLE OF MYTHIC PROPORTION: IN THE WORLD OF ERISA, ARE RETIREMENT PLAN ADMINISTRATORS THE REAL GODS OF OLYMPUS?

Nathan R. Ross*

"Shall we all wield the power of kings? We cán not,
and many masters are no good at all.
Let there be one commander, one authority . . . ."[1]

I. INTRODUCTION

A. *How This Divine War Affects Mortals*

Here sits a middle-aged woman, recently divorced from her spouse of thirty-five years and without professional experience or any marketable skills for the modern workplace.[2] She spent those thirty-five years raising a family and maintaining a home while her husband worked. Post-divorce, she is alone and without savings or financial assistance. She will likely have two financial hurdles facing her: (1) she needs to find a job; and (2) she needs to make up for thirty-five years of saving for retirement. This Article deals with the latter problem: How does she make up for those lost thirty-five years? To most, this has not been a matter of great concern since 1984 when Congress passed the Retirement Equity Act ("REA"),[3] which allows state courts to award a former spouse portions of his or her ex-spouse's retirement benefits that are covered in retirement plans under the Employee Retirement Income Security Act ("ERISA").[4]

However, what happens if a month after the divorce becomes final her former spouse dies, but the plan administrator of her former spouse's retirement account has yet to split the assets? Does this matter? Should it matter? Is she any less entitled to the assets the court would ordinarily award her simply because her former spouse died?

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1 HOMER, THE ILIAD 36 (Robert Fitzgerald trans., Farrar, Straus & Giroux 2004) (1974) (emphasis added).

2 The author created this hypothetical to illustrate the financial issues associated with retirement savings upon divorce.

3 Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (codified at 26 U.S.C. §§ 401, 402, 414, 417).

4 Employee Retirement Income Savings Act of 1974, 29 U.S.C. §§ 1001–1461 (2006).

Surprisingly, there is no uniform answer to this question. Under current jurisprudence, the answer to this question depends on a combination of things, such as the jurisdiction in which one lives and one's former spouse's work location. The Eighth, Ninth, and Tenth Circuits allow one to file the necessary documents in court after his or her ex-spouse dies (or experiences another qualifying event, such as bankruptcy or retirement).[5] However, in the Ninth and Tenth Circuits, one's entitlement to benefits will also depend on where one's former spouse worked.[6] For cases arising in the Third, Fourth, and Seventh Circuits, a petitioner's claim is fixed at the death of a former spouse, thereby denying any award after the ex-spouse dies.[7]

This may seem like a combination of events that is both highly unlikely and of little consequence, but that could not be further from the truth. Going forward, and for the foreseeable future, this problem will continue to grow in both frequency and significance. Since the adoption of ERISA in 1974, and its subsequent amendment in 1984, the likelihood of Americans getting a divorce has increased dramatically.[8] Coupling

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[5] *See* Patton v. Denver Post Corp., 326 F.3d 1148, 1149–50 (10th Cir. 2003) (citations omitted) (affirming the district court's grant of summary judgment when a spouse sought a declaration "that a state domestic relations order granting her survivor benefits in her former husband's pension plan was a 'qualified domestic relations order' (QDRO) under [ERISA]" when the state court "entered the domestic relations order after [her former husband's] death, but *nunc pro tunc* to the date of their divorce eleven years prior to his death, because it concerned benefits from a plan [that was unknown] at the time of the divorce settlement"); Hogan v. Raytheon, Co., 302 F.3d 854, 855 (8th Cir. 2002) (entitling former spouse to receive her former husband's ERISA plan benefits); *In re* Gendreau, 122 F.3d 815, 817 (9th Cir. 1997) (affirming the district court's grant of summary judgment when a Chapter 7 debtor sought a declaratory judgment that a divorce decree award to the debtor's former spouse of a portion of the debtor's pension plan was not a dischargeable debt).

[6] *See Patton*, 326 F.3d at 1151 (deferring in part to the plan summary to determine whether notice prior to death is needed); Trs. of the Dirs. Guild of Am.-Producer Pension Benefts Plans, 234 F.3d 415, 418 (9th Cir. 2000) (stating responsibility for determining whether a domestic relations order ("DRO") is a qualified domestic relations order ("QDRO") rests with the plan).

[7] Samaroo v. Samaroo, 193 F.3d 185, 191 (3d Cir. 1999); Hopkins v. AT&T Global Info. Solutions Co., 105 F.3d 153, 156 (4th Cir. 1997) (stating interest in the plan must vest at retirement); Guzman v. Commonwealth Edison Co., No. 99-C-582, 2000 WL 1898846, at *2 (N.D. Ill. Dec. 28, 2000).

[8] Although the actual divorce rates have remained relatively constant since the enactment of ERISA, the population of the country has grown from 213 million in 1974 to an estimated 312 million in 2011. Accordingly, the number of people getting divorced has increased by forty-four percent. *See* U.S. CENSUS BUREAU, RESIDENT POPULATION PLUS ARMED FORCES OVERSEES—ESTIMATES BY AGE, SEX, AND RACE: JULY 1, 1974 (1974), *available at* http://www.census.gov/popest/data/national/asrh/pre-1980/tables/PE-11-1974.pdf (providing the estimated population data for 1974); *U.S. & World Population Clocks*, U.S.

this with an aging baby boomer population means the dilemmas discussed in this Article are likely to occur with more frequency.[9] Juxtaposing the increased likelihood with the immense amount of retirement benefits contained in ERISA-sponsored retirement plans means the resolution to this problem will determine the distribution of a vast amount of wealth.[10]

This Article will attempt to reconcile this dilemma first by reviewing the origins of the legislation at the heart of the matter—ERISA and the subsequent REA amendment.[11] Then it will delve into the decisions interpreting ERISA's impact on the former spouse of a deceased plan participant. For each side of the debate,[12] it will first explore the stories behind the decisions that established post-event assignment of retirement benefits; then, it will discuss how later courts applied these Theogonic cases to justify posthumous distributions.[13] This step-by-step analysis reveals a conflict more titanic than initially imagined. Current jurisprudence is like Typhoeus giving birth to a three-headed monster

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CENSUS BUREAU, http://www.census.gov/main/www/popclock.html (last visited Dec. 20, 2011) (providing the current population data for the United States and the world).

[9] The term baby boomer refers to the generation born between 1946 and 1964. In 2006, the oldest of the estimated 78.2 million baby boomers began turning sixty at a rate of approximately 7,918 people per day. U.S. Census Bureau, *Oldest Baby Boomers Turn 60!*, NEWSROOM: FACTS FOR FEATURES (Jan. 3, 2006), http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb06-ffse01-2.html. This is a significant age as an ERISA plan participant because this is when one might become eligible for early retirement benefits, and it is a traditional retirement age for many industrial occupations. *See* John W. Thompson, *Defined Benefit Plans at the Dawn of ERISA*, BUREAU OF LABOR STATISTICS (Mar. 30, 2005), http://www.bls.gov/opub/cwc/cm20050325ar01p1.htm (noting that more than one-fourth of workers with early retirement provisions had to wait until at least age sixty to obtain the early retirement benefits).

[10] *See* EMPLOYEE BENEFIT RESEARCH INSTITUTE, FACTS FROM EBRI (2005), *available at* http://www.ebri.org/pdf/publications/facts/0205fact.a.pdf (noting that there were 7,540,000 plan participants and total plan assets were approximately $91.75 billion in 1984). By 2003, the number of participants had grown to 42.4 million people and plan assets had jumped to $1.9 trillion. *Id.* During this time, the number of employers offering ERISA retirement plans increased from 17,303 to 438,000. *Id.*

[11] *See infra* Part I.B (providing the origins of ERISA and REA's legislation).

[12] Rather than broadly analyzing ERISA's anti-alienation provisions, this Article addresses anti-alienation within the context of posthumous distributions of pension plan assets to QDRO beneficiaries. The central matter of contention is whether there is an exemption from ERISA's anti-alienation provisions that sufficiently permits courts to distribute assets to a QDRO beneficiary on a retroactive basis if the plan participant dies before the distribution.

[13] "Theogony" is a poem by Hesiod describing the births and origins of the Greek gods. *The Theogony of Hesiod*, SACRED-TEXTS.COM (Hugh G. Evelyn-White trans., 1914), http://www.sacred-texts.com/cla/hesiod/theogony.htm.

that may require a Herculean effort from Congress to resolve the issue.[14] Finally, this Article will offer suggestions to all relevant parties affected by this dilemma—claimants, plan administrators, and state court judges—regarding what steps one can take to mitigate the injustices that will continue until Congress takes action.

B. *The Origin Story: The Adoption and Evolution of ERISA*

The pension plan—as we know it today—became popular just before the turn of the twentieth century and remained relatively unchanged for many decades.[15] In the 1940s and 1950s, Congress tried regulating pension plans or curbing the abuses growing within the system, but had little success.[16] However, between 1958 and 1974, three events served as catalysts for Congress to make changes once again.[17] The first evidence of change occurred in 1962 when President John F. Kennedy created an Executive Committee on Corporate Pension Funds and Other Private Retirement and Welfare Programs ("Committee").[18] After a four-year study, the Committee concluded, "there were no effective government standards governing welfare and pension plans."[19] This led the Committee to make several recommendations for sweeping reform.[20]

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14 Typhoeus was a terrifying monster that challenged Zeus for supremacy among the gods. NEW LAROUSSE ENCYCLOPEDIA OF MYTHOLOGY 93, 165 (Richard Aldington & Delano Ames trans., Felix Guirand ed., Prometheus Press 9th ed. 1974) (1959). He is the father of many famous Greek monsters, including Cerberus, the three-headed dog that guarded the entrance to Hades. *Id.* Hercules was the son of Zeus and Alcmene. PHILIP MATYSZAK, THE GREEK AND ROMAN MYTHS: A GUIDE TO THE CLASSICAL STORIES 148–58 (2010). Hera assigned Hercules to complete twelve tasks, the twelfth of which was to capture Cerberus. *Id.* He accomplished this task without the aid of any weapons, and when completed, Hercules returned Cerberus to his original place at the entrance to Hades. *Id.*

15 *See* ERISA: A COMPREHENSIVE GUIDE 1-3–1-4 (Paul J. Schneider & Brian M. Pinheiro eds., 3d. ed. 2008) ("The American Express Company established one of the first recorded private pension plans in 1875. By 1910, nearly 100 plans had been formed.").

16 *Id.* at 1-5. Congress enacted the Labor Management Relations Act in 1947. *Id.* It established criminal penalties for breaches of a trustee's fiduciary duties, but was ineffective, and plan abuse continued to grow. *Id.* In 1958, Congress enacted the Welfare and Pension Plan Disclosures Act; however, the original plan lacked enforcement powers, which Congress did not add until 1962. *Id.* at 1-6.

17 *See id.* at 1-6–1-7 (presenting three events that sparked Congress to make changes to regulate the abuse within the pension plan system).

18 *Id.* at 1-6.

19 *Id.*

20 *See id.* ("The Committee recommended the imposition of mandatory minimum vesting and funding standards, the creation of voluntary portability and plan termination insurance systems, the imposition of limitations on pension fund investment in employer securities, and amendments to the Internal Revenue Code's 'qualified status' requirements.").

The Committee's suggested reforms gained public support from the 1963 termination of the Studebaker-Packard Corporation's pension plan, which resulted in nearly 4,400 former employees losing either all or some of their pension benefits.[21] As a direct result of this event, the United Auto Workers Union collaborated with Senator Vance Harke of Indiana to draft the Federal Reinsurance of Private Pensions Act ("FRPPA").[22] Congress, however, did not adopt the FRPPA, and efforts to reform the pension system stalled.[23] The 1969 assassination of Joseph Yablonski, Sr. was the straw that broke the camel's back and thus, the tragic inspiration for change.[24] This horrific act demonstrated the true extent of pension plan corruption and abuse, and it served as an opportunity for New York Senator Jacob Javits to push forward with the pension reform system that remains in effect today.[25]

1. Out of the Chaos a New Pantheon of Government Regulation Emerges: The Adoption of ERISA

Investigation and testimony during Senate subcommittee meetings regarding Senator Javits' proposal revealed a pension system plagued with "harsh vesting provisions, lax funding requirements, and the complete lack of portability and insurance programs."[26] Congress enacted ERISA in response to the chaos that was uncovered by these subcommittee meetings.[27] Unlike previous attempts to reform the pension system,[28] ERISA had several provisions that gave it the authority, the strength, and the tools to ensure reform of the pension

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[21] James A. Wooten, "*The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683, 728–32 (2001).

[22] *Id.* at 735.

[23] *See id.* (noting that the Harke proposal raised the issues surrounding termination insurance programs, but solved few).

[24] ERISA, *supra* note 15, at 1-6. Yablonksi was murdered shortly after he lost the election for union president of the United Mine Workers of America to Tony Boyle. *Id.* at 1-7. Public outcry over the murder sparked a Senate Labor Subcommittee investigation, which led to charges of Boyle's misuse of pension funds. *Id.*

[25] *Id.* at 1-7.

[26] *Id.* (footnotes omitted).

[27] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001–1461 (2006)); Vicki Lawrence MacDougall, *The "Shared Risk" of Potential Tort Liability of Health Maintenance Organizations and the Defense of ERISA Preemption*, 32 VAL. U. L. REV. 855, 898 (1998) (explaining that Congress intended "to 'protect employees from administrative and funding abuses' in employee pension plans and to establish 'fair vesting requirements for pensions'" (quoting Larry J. Pittman, *ERISA's Preemption Clause and the Health Care Industry: An Abdication of Judicial Law-Creating Authority*, 46 FLA. L. REV. 355, 358 (1994).

[28] *See* ERISA, *supra* note 15, at 1-6–1-7 (discussing Congress' previous attempts to reform the pension system).

system.[29] The two provisions at the heart of this Article are the preemption provision and the anti-alienation provision.[30] Together, these provisions consolidate power in plan administrators and have tormented judges seeking to reconcile the application of ERISA with domestic relations law, which is traditionally within the realm of the state court system.[31]

a. How ERISA Casts Its Shadow upon the World: Preemption

Akin to Poseidon's trident,[32] ERISA has a three-part preemption scheme that can wreak havoc on those who interfere with ERISA's power or authority; this has been the source of confusion for courts since ERISA's creation.[33] Within the context of this Article, the debate surrounding the outer limits of ERISA's preemption scheme fuels the question whether a court may posthumously assign retirement plan assets to an alternate payee. The statutory language states ERISA "shall supersede any and all [s]tate laws insofar as they may now or hereafter relate to any employee benefit plan."[34] In *Shaw v. Delta Air Lines, Inc.*,[35] the U.S. Supreme Court held that courts should interpret the language of this provision with the normal meaning of the words.[36]

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29 *Id*. at 1-8.

30 *See* 29 U.S.C. § 1056(d)(1) (2006) (providing ERISA's anti-alienation provision); 29 U.S.C. § 1144(a) (providing ERISA's preemption provision).

31 *See* Metro. Life Ins. Co. v. Wheaton, 42 F.3d 1080, 1086–87 (7th Cir. 1994) (Manion, J., concurring) (arguing that the case should be dismissed because federal courts have declined to assert jurisdiction over divorce cases that do not present a federal question); *see also* DAVID CLAYTON CARRAD, THE COMPLETE QDRO HANDBOOK 3 (3d ed. 2009) ("The potential for conflict between ERISA's anti-assignment clause and the developing state domestic relations law doctrine of pension divisibility rapidly turned into a very serious problem."); MacDougall, *supra* note 27, at 898 (noting that ERISA's preemption clause "is 'one of the most heavily litigated topics in the law of plans'").

32 *See* FRÉDÉRIQUE VIVIER, GREEK MYTHOLOGY 60 (Derek Johnston trans., 2005) (noting that Poseidon was the brother of Zeus and ruler of the seas, and he was known to carry a trident that caused earthquakes when he struck it against anything).

33 *See* ERISA, *supra* note 15, at 9-4 (describing the three parts as: (1) the scope of preemption; (2) the savings clause; and (3) the deemer clause).

34 29 U.S.C. § 1144(a); *see also* Michael Serota & Michelle Singer, Comment, *Maintaining Healthy Laboratories of Experimentation: Federalism, Health Care Reform, and ERISA*, 99 CAL. L. REV. 557, 580 (2011) ("ERISA contains one of the most sweeping preemption provisions ever enacted by Congress, which has been interpreted by the Supreme Court to supplant nearly all state regulation of welfare benefit plans."); MacDougall, *supra* note 27, at 898 ("This preemption clause is 'the most expansive preemption prevision contained in federal law' . . . ." (quoting JAY CONISON, EMPLOYEE BENEFIT PLANS IN A NUTSHELL 314 (1993)).

35 463 U.S. 85 (1983).

36 *See id.* at 96–97 (citing to the dictionary to hold that the phrase "relate to" should be given its normal meaning (internal quotation marks omitted)).

This normal meaning test casted a broad net and forced many courts to apply ERISA to circumstances having little, if any, impact on employee benefit plans.[37] For example, state court judges had to determine whether the phrase *with respect to* extended to domestic relations issues, such as divorce.[38] If a judge determined that a spouse's ERISA-covered pension plan was a marital asset, then the judge would also have to determine whether the assets related to the ERISA plan under *Shaw*.[39] This additional step would have been necessary because following the provisions of ERISA would render the state court powerless to include those assets in a divorce settlement since ERISA also contained an anti-alienation provision.[40]

b. How ERISA Maintains Its Power over the Purse: Anti-Alienation

Section 1056 of ERISA states: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."[41] This provision prevents a plan participant or a plan administrator from separating out and segregating assets within an ERISA-sponsored plan from itself. The purpose of this restriction is to protect a participant from financial improvidence and to help ensure the assets will actually be available for retirement purposes.[42] However, the State of California began determining that pension benefits earned during the course of a marriage were marital assets and were divisible in divorce proceedings.[43]

The reason anti-alienation is particularly troublesome in divorce proceedings is due to ERISA's failure to articulate what interest a spouse

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37 ERISA, *supra* note 15, at 9-7.

38 *See* Trs. of the Dirs. Guild of Am.-Producer Pension Benefits Plans v. Tise, 234 F.3d 415, 423 (9th Cir. 2000) (presenting the court's discussion of the phrase *with respect to* in a case involving the issue of whether a state court order is also effective as a QDRO under ERISA); *see also infra* notes 117–20 and accompanying text (noting the court's interpretation of the statutory language and analysis in *Tise*).

39 *See, e.g.*, Hogan v. Raytheon Co., 302 F.3d 854, 855 (8th Cir. 2002) (demonstrating that the court determined what assets related to the ERISA-governed pension plan). However, state courts that found ERISA did not preempt state divorce proceedings do not account for Congress' clear contemplation of the scope of ERISA's preemption and its relationship to state laws. *See* 29 U.S.C § 1144(b)(2)(A) (2006) (noting that the only state laws that are exempt are those that regulate insurance, banking, or securities).

40 29 U.S.C. § 1056(d)(1) (2006).

41 *Id.*

42 Hawkins v. Comm'r, 86 F.3d 982, 988 (10th Cir. 1996).

43 *See* Carpenters Pension Trust v. Kronschnabel, 460 F. Supp. 978, 983 (C.D. Cal. 1978) ("This established state policy of including pension benefits in the pool of community property generated by husband and wife during marriage should not be emasculated cavalierly by the court where neither the language of the federal statute, nor the underlying policies of preemption require it.").

would have in the participant's pension benefits.[44] According to one circuit court judge, this omission "left women who worked in the home and contributed significantly to the family's financial security without the ability to obtain any pension benefits upon their husbands' death or upon divorce."[45] ERISA's preemption of state laws is necessary to further its goal of creating standard procedures applicable to all benefit plans.[46] However, the lack of guidance concerning the application of the anti-alienation provision to domestic relations law seemed at odds with another policy carried out by ERISA, which is to protect the financial well-being of employees and their families.[47] This lack of guidance ultimately led Congress to substantially revise ERISA.

C. *If ERISA Were Zeus, His Favorite Son Hercules Has Arrived: The Passage of the REA and the Birth of the Qualified Domestic Relations Order*

Between 1974 and 1984, Congress provided no indication that state courts should do anything other than follow the broad preemptive language of ERISA, yet many courts were reluctant to conclude that the legislation reached into the domestic relations arena.[48] In 1984, Congress responded to this confusion by passing the REA, which created "an exception not only to ERISA's rule against assignment of plan benefits but also to ERISA's broad preemption of state law."[49] Congress created a qualified domestic relations order ("QDRO") as the mechanism to allow an alternate payee to segregate funds from the participant's pension plan.[50] A QDRO "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all

44 Ablamis v. Roper, 937 F.2d 1450, 1453 (9th Cir. 1991).
45 *Id.*
46 ERISA, *supra* note 15, at 9-3.
47 *Id.* at 1-8–1-9.
48 *See* Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) ("State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden."); Trs. of the Dirs. Guild of Am.-Producer Pension Benefit Plans v. Tise, 234 F.3d 415, 419 (9th Cir. 2000) ("[T]he courts of appeals disagreed about whether state court orders issued pursuant to domestic relations proceedings could affect the distribution of pension benefits governed by ERISA."); Metro. Life Ins. Co. v. Wheaton, 42 F.3d 1080, 1082 (7th Cir. 1994) ("Before [the REA] was passed, [courts] had held that ERISA did not preempt state domestic relations law.").
49 *Tise*, 234 F.3d at 420; *see also Wheaton*, 42 F.3d at 1084 (noting that the REA provides "an exception to preemption for [QDROs] pertaining to all ERISA plans, not just pension plans"); *Ablamis*, 937 F.2d at 1454 (highlighting that Congress made an important exception for victims of divorce or separation). "To protect their interests, the REA creates an express statutory exception to the prohibition on assignment and alienation in the case of distributions made pursuant to certain state court orders." *Id.*
50 29 U.S.C. § 1056(d)(3)(A) (2006).

or a portion of the benefits payable with respect to a participant under a plan."[51]

To qualify as a QDRO, a state domestic relations order ("DRO") must meet three rather complex, but clearly defined, sets of qualifications.[52] First, the DRO must be a "judgment, decree, or order . . . which . . . relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependant of a participant, and . . . is made pursuant to a [s]tate domestic relations law . . . ."[53] Second, the DRO must clearly specify:

> (i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,
> (ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,
> (iii) the number of payments or period to which such order applies, and
> (iv) each plan to which such order applies.[54]

Third, the DRO must not require the plan to do any of the following: (1) it cannot "require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan"; (2) it cannot "require the plan to provide increased benefits (determined on the basis of actuarial value)"; and (3) it cannot "require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified [DRO]."[55]

Once the plan administrator has received the DRO, it must segregate the funds in question.[56] Then, the administrator has eighteen months to determine whether the DRO meets the requirements to become a QDRO.[57] If so, the plan administrator must pay the segregated amount to the alternate payee; however, if the plan administrator fails to make

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51 *Id*. § 1056(d)(3)(B)(i)(I).
52 *Id*. § 1056(d)(3)(C)–(D).
53 *Id*. § 1056 (d)(3)(B)(ii)(I)–(II); *see also Tise*, 234 F.3d at 420 n.3 (noting that Suzanne Tise was an appropriate alternate payee because the award was for child support payments and she was the children's mother).
54 29 U.S.C. § 1056 (d)(3)(C)(i)–(iv).
55 *Id*. § 1056(d)(3)(D)(i)–(iii).
56 *Id*. § 1056(d)(3)(H)(i)–(ii).
57 *Id*.

this determination within eighteen months, the plan administrator must pay the funds to whoever would receive them, absent the DRO.[58]

Although Congress set forth a detailed list of qualifications that a DRO must meet for the plan administrator to consider it a QDRO, Congress failed to clarify one critical factor: *When* does the state "judgment, decree, or order" create the alternate payee's rights of assignment?[59] More specifically, are the alternate payee's rights created when a court issues a judgment, divorce decree, written order, or when the plan administrator accepts the judgment, divorce decree, or written order? Moreover, if based on the plan administrator's acceptance, is it based on acceptance of a DRO or based on certification of a QDRO? Perhaps Congress was trying to avoid Pandora's mistake and leave the box closed.[60]

II. DRINKING A CUP OF AMBROSIA: IN SOME COURTS A QDRO IS IMMORTAL

The first line of cases this Article explores, highlighting the deference the U.S. Supreme Court shows to state domestic relations law,[61] will illustrate how some state courts are able to change DROs after the participant's death. This school of thought is founded on the belief that the DRO—created under state law—is actually the instrument that creates the ex-spouse's interest in the marital property, rather than the qualification of the DRO by the plan administrator, which creates the QDRO.[62]

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[58] *Id.* § 1056(d)(3)(H)(ii)–(v); *see also Tise*, 234 F.3d at 422 (citing 29 U.S.C. § 1056(d)(3)(H)); ERISA, *supra* note 15, at 3-68 ("If, within such 18-month period, the order is determined not to be a QDRO or the qualified status of the order has not been resolved, the plan administrator must pay the segregated amounts (plus earnings) to the person who would have been entitled to such amounts if there had been no order.").

[59] 29 U.S.C. § 1056(d)(3)(B)(ii).

[60] Zeus commanded the creation of a woman made from clay. MATYSZAK, *supra* note 14, at 29. She was named Pandora and received gifts from the other gods. *Id.* These gifts were stored in an urn (Pandora's box), which Pandora was instructed not to open. *Id.* However, Pandora's curiosity led her to open the box and release its contents. *Id.* Thus, Greek mythology credits Pandora with unleashing evil, disease, and violence into the world. *Id.*

[61] Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979).

[62] *See* 29 U.S.C. § 1056(d)(3)(G) (establishing that the plan administrator creates the QDRO and requiring that the plan establish procedures to determine the qualified status of a DRO).

A. *The Divorce Decree is the Muse that Will Bring Eternal Life for the QDRO*

An early example of the DRO's potential for immortality is *In re Gendreau*,[63] in which the U.S. Court of Appeals for the Ninth Circuit refused to allow William Gendreau's bankruptcy to cut off his ex-wife's interest in his pension plans.[64] William and Colleen Gendreau were divorced in 1992, and Colleen received a judgment from the state court of a fifty percent interest in William's pension plans for the time they were married.[65] In January 1993, Colleen sought a QDRO to obtain her interest in the pension plans.[66] However, in May 1993, the plan administrator refused to qualify Colleen's DRO and refused to distribute the funds because her DRO failed to comply with QDRO requirements.[67] Before she obtained a qualified order, William filed for bankruptcy and sought to have Colleen's interest in his pension plan discharged as part of his bankruptcy petition.[68]

The basis for William's claim was that ERISA's anti-alienation provision precludes a claimant's property interest from arising until the claimant obtains the QDRO. [69] William argued that absent a QDRO, there is merely "a right to obtain a QDRO and payment."[70] However, the Ninth Circuit rejected William's argument and held it was the divorce decree, written pursuant to state law, which established Colleen's interest in the pension proceeds.[71]

The court found several provisions within ERISA and the REA justifying this conclusion, provisions later courts used to rationalize posthumous amendments to a DRO, just as the Ninth Circuit allowed a post-bankruptcy amendment to Colleen's QDRO.[72] First, the court

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[63] 122 F.3d 815 (9th Cir. 1997). This case addresses the parallel issue of a spouse who is seeking to enforce her divorce decree against her ex-husband who filed for bankruptcy between the period when Mrs. Gendreau obtained her divorce decree and obtained a QDRO. *Id*. at 817. The holding of this case is significant, as courts later apply its rational to the context of a participant's death. *See Tise*, 234 F.3d at 423 ("As the circumstances of this case illustrate, unless the QDRO could issue after the plan participant's death, Congress' intent to protect the interests of plan participants' former dependents could be thwarted.").

[64] *Gendreau*, 122 F.3d at 819.

[65] *Id*. at 817.

[66] *Id*.

[67] *Id*.; *see also* 29 U.S.C. § 1056(d)(3)(B) (listing the QDRO requirements).

[68] *Gendreau*, 122 F.3d at 817.

[69] *See supra* notes 42–48 and accompanying text (discussing ERISA's anti-alienation provision).

[70] *Gendreau*, 122 F.3d at 818.

[71] *Id*. *But see* Samaroo v. Samaroo, 193 F.3d 185, 190 (3d. Cir. 1999) ("Under ERISA, the rights could only be conveyed by a QDRO.").

[72] *See* Trs. of the Dirs. Guild of Am.-Producer Pension Benefits Plans v. Tise, 234 F.3d 415, 421 (9th Cir. 2000) (noting that the court was expanding upon its own conclusion—the

determined that subsequent to the divorce decree, Colleen's claim becomes one against the plan administrator, rather than one against her ex-husband.[73] This means that William's discharge of his debt doesn't impact Colleen's interest. Second, ERISA requires the plan administrator to segregate the funds that will become payable to the alternate payee through the QDRO based merely on notice of the pending claim.[74] Third, the court determined any other conclusion would defeat the policies ERISA sought to protect.[75]

While the court seemingly arrived at the correct conclusion, it muddied one policy interpretation it used to justify its later conclusions. Specifically, the court determined that a QDRO is not a declaration of one's interest in the assets, but merely a restriction on enforcement of that interest.[76] However, this seems to make the existence of a QDRO superfluous because ERISA, as originally written, was sufficient to prevent enforcement of an alternate property interest.

B. Like Hermes Guides the Souls of the Dead, a Vested Property Interest Guides the QDRO to Immortality

Despite its potentially flawed interpretation of the purpose behind a QDRO, just three years later, the Ninth Circuit applied the principles it articulated in *Gendreau* to a circumstance in which a participant died before the claimant obtained a QDRO.[77] In *Trustees of the Directors Guild of America-Producer Pension Benefits v. Tise*, Charles Myers and Suzanne Tise, although not married, had two children together.[78] In 1981, after their relationship ended, Tise obtained a default paternity and child support judgment against Myers, which he never voluntarily paid.[79] In 1991, Tise obtained a state court order barring distributions from Myers' pension plans unless the Directors Guild of American-Producer Pension Benefits Plan ("the Plan") notified Tise before the distribution.[80]

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divorce decree creates the participant's interest in the plan and the QDRO is merely a restriction on enforcement of that judgment).

73 *See Gendreau*, 122 F.3d at 818 (finding the shift in liability to Colleen is evident because she has legal recourse to sue the plan, rather than William, for failure to pay the claim).

74 *Id.*

75 *See id.* at 819 ("[T]he purpose of the QDRO exception was to protect the financial security of divorcees. This protection would be meaningless if [an ex-husband] could thwart his spouse's interest by filing bankruptcy before she obtained a QDRO . . . .").

76 *Id.*

77 *Tise*, 234 F.3d at 417–18.

78 *Id.* at 417.

79 *Id.*

80 *Id.*

Although the order did not specifically name a pension plan, Tise notified and provided a copy of the order to the Plan.[81]

Later, the Internal Revenue Service ("IRS") served a competing levy on the Plan for Myers' failure to pay taxes; the Plan notified Tise and inquired into her intent to obtain a QDRO.[82] In response, Tise immediately obtained a writ of execution against the Plan and ultimately moved the court for an order declaring that she was entitled to a QDRO.[83] It was not until April 1996 that Tise was able to obtain the QDRO order.[84]

The delay arose because Myers died in February 1995, and two months prior, he named Yvonne Curry as the sole beneficiary of his pension plan benefits.[85] Upon Myers' death, Tise, Curry, and the IRS submitted three competing claims against the Plan.[86] In response, the Plan and the various parties contested the conflicting claims.[87] However, the district court resolved the competing claims in favor of Tise once she obtained her DRO from the state court.[88] The foundation for the state court's DRO in 1996 was its asserted jurisdiction over Myers' pension plan via its 1991 order, which created the right for Tise to collect proceeds from the plan based on the 1981 judgment for child support.[89] To accomplish this, the court issued a *nunc pro tunc* (now for then) order that amended the 1991 order to conform to the provisions necessary to create a QDRO for Tise.[90] Both Curry and the Plan appealed the district court's decision.[91]

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81 *Id.* at 417–18.
82 *Id.* at 418.
83 *Id.*
84 *Id.* at 419.
85 *Id.* at 418.
86 *Id.*
87 *Id.* at 418–19. The Plan sought a declaratory judgment to determine how much it was obligated to pay to each party, and it obtained a stay of Tise's proceedings to obtain a QDRO. *Id.* at 418. In response, Curry, Tise, and the IRS sought interpleader actions, which Tise sought to stay until she was able to obtain a QDRO. *Id.* Both the Plan and Curry contested Tise's motion to stay the proceedings. *Id.*
88 *See id.* at 419 (splitting the proceeds: $136,703.50 to the IRS; $226,071 to Tise; and $3,000 to the Plan for attorneys' fees).
89 *Id.* at 418–19. The Marin County Superior Court issued this QDRO on April 19, 1996, which was fourteen months after Myers' death on February 12, 1995. *Id.* at 419.
90 *Id.*
91 *Id.* One week before oral arguments began, the IRS unexpectedly withdrew from the case. *Id.* The appellate court retained jurisdiction but remanded to the district court to redistribute the funds. *Id.* The district court awarded Tise an additional $97,367 in attorneys' fees to fully satisfy the 1996 state court order. *Id.* The Plan and Curry maintained their appeals after the redistribution. *Id.*

Curry asserted three independent lines of reasoning supporting her claim that she, not Tise, was entitled to the proceeds from Myers' pension plan. Curry first argued that Tise's 1996 QDRO was unenforceable because Curry's interest in the plan proceeds vested in 1995, immediately upon Myers's death.[92] Second, Curry claimed that immediately upon Myers' death there was no longer a benefit payable with respect to the participant (Myers), so the benefit could only be payable to the listed beneficiary (Curry).[93] Finally, Curry claimed she "cannot be bound by the domestic relations orders issued in the Tise-Myers child support proceedings."[94]

Curry's vesting argument was based on the premise that a QDRO is required before a participant's death for the proceeds to be assignable to an alternate payee.[95] Rejecting this contention, the court used its holding in *Gendreau* to breathe life into Tise's QDRO after Myers' death.[96] The court determined:

> The QDRO provision is an exception not only to ERISA's rule against assignment of plan benefits but also to ERISA's broad preemption of state law. State family law can, therefore, create enforceable interests in the proceeds of an ERISA plan, so long as those interests are articulated in accord with the QDRO provision's requirements.[97]

With this, the court crafted a scenario in which the state court order creates the claim against the pension plan proceeds,[98] and the plan administrator enforces that claim.[99] Although it relied on *Gendreau*, the

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92 *Id.*

93 *Id.* at 423.

94 *Id.* at 424.

95 *Id.* at 421 n.5.

96 *Id.* at 421.

97 *Id.* at 420 (citation omitted); *see also* Carland v. Metro. Life Ins. Co., 935 F.2d 1114, 1120 (10th Cir. 1991) (holding that a divorce decree is not preempted by ERISA).

98 *Compare In re* Gendreau, 122 F.3d 815, 817 (9th Cir. 1997) (involving a case where the court order was a divorce decree), *with Tise*, 234 F.3d at 417 (presenting a case where the state court order was a child support judgment).

99 *Tise*, 234 F.3d at 421 ("Under this scheme, then, whether an alternate payee has an interest in a participant's pension plan is a matter decided by a state court according to the state's domestic relations law. Whether a state court's order meets the statutory requirements to be a QDRO, and therefore is enforceable against the pension plan, is a matter determined in the first instance by the pension plan administrator, and, if necessary, by a court of competent jurisdiction.").

court correctly re-characterized a QDRO as a tool for enforcement, as opposed to a mechanism to prevent enforcement.[100]

The court also found four statutory and structural aspects of ERISA to support its holding that a QDRO is not required before the participant's death.[101] First, the court recognized that ERISA does not specify that a QDRO must be in hand before benefits are payable.[102] Second, when a plan administrator receives a DRO, the administrator is required to segregate the funds in question away from the remaining proceeds in the participant's pension, while the plan administrator determines whether the DRO qualifies as a QDRO.[103] According to the court, "[t]his benefit-segregation requirement obviously assumes that benefits may already be payable during the period the plan is determining whether the DRO is a QDRO."[104]

Third, ERISA provides an eighteen-month period for the plan to determine whether the DRO qualifies as a QDRO.[105] The court concluded that Congress did not create this eighteen-month period for the plan administrator to make its decision about the DRO.[106] "Rather, the evident purpose of the 18-month period was to provide a time in which any defect in the original DRO could be cured."[107] Fourth, the plan administrator will pass the proceeds to the participant's beneficiary only if the alternate payee is unable to perfect the DRO into a QDRO within the eighteen-month period.[108] According to the court, the combined effort of these provisions "permits an alternate payee who has obtained a state law DRO before the plan participant's retirement, death, or other benefit-triggering event to perfect the DRO into a QDRO thereafter."[109]

Moreover, the court found strong policy arguments in favor of this conclusion, finding that the alternate conclusion would necessarily make the determination of the alternate payee's rights subject to events that were beyond the alternate payee's control.[110] Likewise, any other

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100 *Gendreau*, 122 F.3d at 819.
101 *Tise*, 234 F.3d at 421–22.
102 *See id.* at 421 ("ERISA nowhere specifies that a QDRO must be in hand before benefits become payable.").
103 29 U.S.C. § 1056(d)(3)(H)(i) (2006); *see also Tise*, 234 F.3d at 421 (citing and discussing 29 U.S.C. § 1056(d)(3)(H)).
104 *Tise*, 234 F.3d at 422.
105 29 U.S.C. § 1056(d)(3)(H)(ii).
106 *Tise*, 234 F.3d at 422.
107 *Id.*
108 29 U.S.C § 1056(d)(3)(H)(iii); *see also Tise*, 234 F.3d at 422 (citing and discussing 29 U.S.C. § 1056(d)(3)(H)).
109 *Tise*, 234 F.3d at 422.
110 *Id.* at 423.

conclusion "could encourage opponents of the putative alternate payee to delay or complicate issuance or approval of a QDRO in the hope that the benefit-triggering event would occur in the meantime."[111] The court concluded that either of these reasons would frustrate Congress's intent, when it passed REA, to protect the financial interests of the plan participants' former dependents.[112]

Curry's with-respect-to argument was based on the ERISA language that grants the right to assign proceeds only those benefits that are "payable *with respect to a participant* under a plan" to an alternate payee.[113] She contended that upon Myers' death, the proceeds were no longer payable with respect to him, but rather payable to her as the beneficiary, thus removing the proceeds from the scope of Tise's QDRO.[114] The court quickly dismissed this argument as being inconsistent with both the statutory language and entire statutory scheme of ERISA and the REA.[115]

The court engaged in some brief statutory interpretation to make a distinction between benefits with respect to a participant and benefits payable to a beneficiary.[116] Specifically, the court illustrated that a beneficiary is within the statutory definition of a participant according to ERISA.[117] Drawing upon the statutory language, the court interpreted the meaning of "with respect to" as being analogous to "on account of,"[118] which led the court to the conclusion that "[t]hose benefits remain payable 'with respect to' Myers even after his death because they accrued for his benefit and that of his beneficiaries."[119]

Curry's scope argument was premised on the idea that even if the child support order created Tise's right to the proceeds, Curry was not a party to that proceeding and not bound to follow it.[120] While the court conceded that Curry was correct in this regard, the court further admitted that it cannot afford Curry relief on this ground alone and that she is the victim of a harsh result intended by Congress:

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111 *Id.*
112 *Id.*
113 *Id.* (quoting 29 U.S.C. § 1056(d)(3)(B)(i)(I)).
114 *Tise*, 234 F.3d at 423.
115 *Id.* at 423–24.
116 *Id.* at 424.
117 *Id.*; *see also* 29 U.S.C. § 1002(7) (2006) ("The term 'participant' means any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . . or whose beneficiaries may be eligible to receive any such benefit.").
118 *Tise*, 234 F.3d at 424 (internal quotation marks omitted).
119 *Id.*
120 *Id.*

> Through its QDRO provisions, ERISA elevates a plan participant's legal obligations, commonly to a former spouse or children of a previous marriage, over the participant's express wishes to provide for other individuals as designated beneficiaries. While this result may seem harsh to the designated beneficiary, the fact is that Congress *intended* this displacement of a plan participant's wishes in some circumstances, in an effort to mitigate the impact of divorce upon children and former spouses.[121]

Although its rationale was shaky at times, the court denied all three of Curry's arguments and ruled in Tise's favor. Most importantly, the court found that "[b]ecause Tise had placed the plan on notice of her interest in Myers' pension plan proceeds before his death, the fact that he died before the QDRO issued is immaterial."[122] The court went further to note that the plan had notice of the pending QDRO before Myers' death, and Tise obtained her QDRO within the eighteen-month time limit.[123] Here, the court emphasized plan notice, a matter not previously discussed and certainly not part of the court's statutory or policy interpretations of ERISA. The court's decision to allow posthumous QDROs did not resolve the matter, however.

C. *Opening Pandora's Box: What Evils are Unleashed when the Decision Between Mortality and Immortality Rests in the Hands of the Plan Administrator*

Even though the Ninth Circuit may have correctly resolved the matter regarding the ability to issue a posthumous QDRO, it created a much bigger problem. The *Tise* court emphasized that the plan's notice of the pending QDRO played a role in its decision to award the proceeds to Tise, although it offered no justification for this emphasis.[124] Because the court declined to assert whether it would reach the same conclusion if the plan did not have prior notice, one could consider this observation merely dicta.[125] Moreover, the court's analysis downplayed the need for prior notice when it said "[t]his complex, carefully articulated statutory

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121 *Id.* at 425.

122 *Id.* at 426.

123 *Id.*

124 *See id.* ("Because Tise had placed the plan on notice of her interest in Myers' pension plan proceeds before his death, the fact that he died before the QDRO issued is immaterial.").

125 *See id.* at 426 n.9 (declining to determine whether a QDRO can be issued if the plan is not on notice before the participant's death).

scheme, then, plainly contemplates, and accounts in detail for, the situation in which the event that triggers the payment of benefits occurs *before* the plan knows whether it will be obliged to make payments to an alternate payee."[126]

Nevertheless, in 2002, the U.S. Court of Appeals for the Eighth Circuit relied on *Tise* and its notice requirement for its decision in *Hogan v. Raytheon Co.*[127] The Eighth Circuit determined that the DRO in question met "the requirements of a QDRO because Raytheon was *put on notice* that the [d]ecree had [sic] issued and may be a QDRO, and the [order] was filed during the eighteen-month period permitted under ERISA to secure a QDRO."[128] According to the Eighth Circuit, prior notice rendered the participant's death irrelevant.[129] Thus, we can see how *Tise* lifted the lid on Pandora's box by giving credence to the plan administrator's notice prior to death.

The following year, the U.S. Court of Appeals for the Tenth Circuit examined whether a claimant could obtain a QDRO after the death of a participant when the plan had not received notice of the DRO before the participant's death.[130] Just as Bellerophon was the first to capture and ride Pegasus,[131] the Tenth Circuit was the first court to examine and reject the notice requirement. In *Patton v. Denver Post Corp.*, the court focused on interpreting the plan provisions, rather than conducting a statutory interpretation of ERISA, because it found that:

> Neither side, either in the briefs or at oral argument, provided any specific citation to support its assertion. Nor have we been able to discover any part of the statute itself or any interpretation of the statute in case law or secondary scholarly materials demonstrating to us that the statute requires such notice to be given.[132]

In this instance, the court determined that the plan permitted posthumous changes without notice before the participant's death

[126] *Id.* at 422. The court emphasized that the triggering event occurs before the plan administrator is on notice. *Id.*

[127] 302 F.3d 854, 857 (8th Cir. 2002).

[128] *Id.* (emphasis added). The court held that the lower court was correct to award benefits to the former spouse. *Id.*

[129] *Id.*

[130] *See supra* notes 108–09 and accompanying text (noting that ERISA's provisions require an alternate payee to receive notice of the DRO before the participant's death).

[131] *See* MATYSZAK, *supra* note 14, at 134 (noting that during his mission to kill Chimera, Athena gave Bellerophon a magical harness to tame and ride Pegasus, the winged horse offspring of Medusa and Poseidon).

[132] 326 F.3d 1148, 1151 (10th Cir. 2003).

because: (1) the plan did not specify that notice was required before death; and (2) the plan had procedures in place for "post hoc determinations of whether the domestic relations order [was] qualified."[133] The court gave more weight to the latter for its basis in the language of the statute, despite not undertaking a statutory interpretation of ERISA.[134]

Patton's significance expanded beyond the Tenth Circuit because it expressly relied on the notice issue that originated in *Hogan*. Specifically, the Tenth Circuit stated: "While *Hogan* noted that the plan had notice a QDRO might issue, such notice was not essential to its determination of the order's validity."[135] Thus, *Tise* has created a disfigured body of law that, like the Minotaur, is seemingly the product of two different species.[136] All three jurisdictions permit posthumous QDROs: The Eighth and Ninth Circuits require the plan have notice before the participant's death, but the Tenth Circuit does not.[137]

The Tenth Circuit relied on the power of a *nunc pro tunc* order as a legitimate and binding tool to adjudicate domestic relations law. One wonders whether *Patton* would permit the use of a *nunc pro tunc* order after the eighteen-month statute of limitations. In its analysis of *Hogan*, the court mentioned that the timing of Mr. Hogan's death was irrelevant,[138] but it failed to specify the scope of *nunc pro tunc* power within the scope of the statutory period. A more recent case sheds little explicit clarity on this issue, but it resolves the matter similarly to the Tenth Circuit.

In *R.A.F. ex rel. Woodall v. Southern Co. Pension Plan*,[139] the U.S. District Court for the Middle District of Alabama analyzed the legitimacy of a posthumous QDRO in a manner similar to *Patton*. Similar to the *Patton* court, the Middle District of Alabama looked to the

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133 *Id.* The court found that notice of a beneficiary is not required before death; therefore, notice of a DRO should not be required either. *Id.*

134 *See id.* at 1151 n.1 (noting that for eighteen months from the date the first payment would have been made, the decision about the QDRO is retroactive); *see also* 29 U.S.C. § 1056(d)(3)(H)(v) (2006) (providing the text of the statute and specifically noting that the eighteen-month period begins "with the date on which the first payment would be required to be made under the [DRO]").

135 *Patton*, 326 F.3d at 1153.

136 *See* VIVIER, *supra* note 32, at 96 (noting that one of the most famous monsters in Greek mythology, the Minotaur, had the head of a bull and the body of a human).

137 *Compare* Hogan v. Raytheon, Co., 302 F.3d 854, 857 (8th Cir. 2002) (requiring that the plan have notice before the participant's death), *and* Trs. of the Dirs. Guild of Am.-Producer Pension Benefits Plans v. Tise, 234 F.3d 415, 426 (9th Cir. 2000) (requiring that the plan have notice before the participant's death), *with Patton*, 326 F.3d at 1153 (noting that the participant's death before the notice was irrelevant).

138 *Patton*, 326 F.3d at 1153.

139 No. 2:07-cv-192-WKW, 2008 WL 2397391 (M.D. Ala. June 10, 2008).

provisions of the plan itself to determine whether the plan should be required to accept the QDRO without any notice.[140] Regarding this issue, the court held that the plan could be required to accept a posthumous QDRO because "the Plan itself allows for benefits to be paid in certain cases when a QDRO is not received prior to the death of a participant."[141]

R.A.F. is more significant for its analysis than for its factual determination,[142] primarily because it is a second jurisdiction utilizing the plan-provision analysis the Tenth Circuit created in *Patton*.[143] In addition, *R.A.F.* sheds a dim, but probably correct, light on the matter of issuing a *nunc pro tunc* order after eighteen months.[144] Here, the court rejected the use of a *nunc pro tunc* order because two years had passed since the participant's death.[145] In doing so, it also distinguished the use of a *nunc pro tunc* in another case based on the length of time that had passed after the participant's death.[146] Not all jurisdictions, however, adhere to the view that plan administrators can change terms of the QDRO after the participant's death.

III. WHAT IF THERE WERE NO GOLDEN FLEECE: SOME COURTS DO NOT PERMIT CHANGES TO A QDRO AFTER DEATH

Regardless of whether the plan permits filing a QDRO after the participant's death, with or without notice, there are some jurisdictions in which the participant's death terminates the alternate payee's opportunity to perfect the DRO into a QDRO. Like *Tise* and its progeny, this faction of courts took an indirect path to arrive at its conclusion.[147] The foundation-laying case for the denial of posthumous QDROs is

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140 *Id.* at *10.

141 *Id.*

142 *See id.* at *10–11 (emphasizing that although the court found that the plan could be liable to a QDRO received without notice after the participant's death, it held, in this instance, that the plaintiff's divorce decree did not qualify as a QDRO because the alternate payee submitted it two years after the participant's death).

143 *See id.* at *10 (determining that the plan rules permitting a certain posthumous situation was a factor in determining whether the QDRO should be accepted); *see also Patton*, 326 F.3d at 1151 (interpreting the plan provisions to determine that the posthumous QDRO would not create an additional burden on the plan). The court did not cite to any authority when conducting this analysis, and further distinguished itself from the factual circumstances of *Patton*. *Woodall*, 2008 WL 2397391, at *10.

144 *Id.*

145 *Id.*

146 *Id.* (citing Payne v. GM/UAW Pension Plan, No. CIV.A. 95-73554, 1996 WL 943424, at *3 (E.D. Mich. May 7, 1996)).

147 *See supra* notes 61–62 and accompanying text (revisiting the differences in the circuits' positions).

Hopkins v. AT&T Global Information Solutions Co.[148] In *Hopkins*, the U.S. Court of Appeals for the Fourth Circuit denied a plan participant's former spouse her ability to obtain a QDRO after the participant separated from the plan because the benefits had already vested to his current spouse.[149]

Paul and Vera Hopkins divorced in 1986 after twenty-six years of marriage.[150] At the divorce hearing, the court awarded Vera alimony rather than a distribution from Paul's pension, which the court declared was a marital asset.[151] To collect her alimony, Vera obtained a court ordered garnishment of Paul's wages that continued until his retirement in 1993.[152] Under the AT&T pension plan, Paul collected his retirement income from a qualified joint and survivor annuity that also had a fifty percent benefit to his surviving spouse, who was Sherry Hopkins at the time of his retirement.[153]

In 1994, Vera obtained an order from the Wood County Circuit Court naming herself, rather than Sherry, as the surviving spouse on Paul's qualified joint and survivor annuity.[154] However, the U.S. District Court for the Southern District of West Virginia determined that the court order naming Vera the surviving spouse of the qualified joint and survivor annuity was not a valid QDRO, as the annuity did not convey benefits that were "payable with respect to a participant,"[155] because the benefits had become payable with respect to the beneficiary immediately upon Paul's retirement.[156] To settle this matter, the Fourth Circuit had to determine when spousal benefits vest to the named beneficiary.[157]

The Fourth Circuit found three ERISA provisions demonstrating that benefits vest to the plan participant's current spouse at the date of retirement. First, the plan pays benefits to the spouse who was married to the participant on the date of the participant's retirement, rather than

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148 105 F.3d 153 (4th Cir. 1997).
149 *Id.* at 156.
150 *Id.* at 154.
151 *Id.*
152 *Id.*
153 *Id.* at 154–55.
154 *Id.* at 155. The original order named Vera the alternate payee for Mr. Hopkins' pension benefits as well as the surviving spouse for the annuity. *Id.* The county court later split the order into a pension order and a surviving spouse order. *Id.* AT&T only contested the surviving spouse order. *Id.*
155 *Id.* at 156 (quoting 29 U.S.C. § 1056(d)(3)(B)(i)(I) (2006)) (internal quotation marks omitted); *see also supra* Part I.C (discussing ERISA's statutory language).
156 *Hopkins*, 105 F.3d at 156.
157 *See id.* (determining Hopkins is a beneficiary and the benefits are not "paid with respect to [the] participant" (quoting 29 U.S.C. § 1056(d)(3)(B)(i)(1)). *But see* Trs. of the Drs. Guild of Am.-Producer Pension Benefits Plans v. Tise, 234 F.3d 415, 423 n.7 (9th Cir. 2000) (rejecting the finding in *Hopkins* as being too narrowly focused and not applicable).

on the participant's death—as ERISA had previously required.[158] Second, under the REA, the plan participant only has a ninety-day window before retirement to change the beneficiary, and he may only do so upon approval of the current spouse.[159] Third, the REA prohibits the participant from changing beneficiaries after retirement.[160] The court further noted that its conclusion "not only is consistent with the overall framework of ERISA, but also balances the competing interests of the former and current spouses."[161]

Three years later, the U.S. Court of Appeals for the Third Circuit expanded upon *Hopkins*, similar to *Tise*'s expansion of *Gendreau*,[162] and concluded that plan benefits vest to the beneficiary at the participant's death. In *Samaroo v. Samaroo*,[163] the Third Circuit affirmed the decision of the U.S. District Court for the District of New Jersey, which relied on the Fourth Circuit's decision in *Hopkins* to determine that "entitlement to a survivor's annuity in respect [to the participant] had to be determined as of the day [the participant] died."[164]

Winston Samaroo died in 1987 while still working at AT&T Technologies.[165] At his death, he had been divorced from Louise Robichaud for slightly less than three years.[166] The divorce decree granted half of Samaroo's pension payments to Robichaud upon retirement, but did not discuss division of Samaroo's survivor annuity.[167] Despite this, after Samaroo's death, Robichaud obtained a court order retroactively amending her divorce decree and granting her a fifty percent survivorship right to Samaroo's annuity benefits.[168]

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158 *Hopkins*, 105 F.3d at 156.

159 *Id.* at 156–57.

160 *Id.* at 157.

161 *Id.*

162 *Tise*, 234 F.3d at 421. In *Gendreau*, the court considered whether a plan participant could limit his ex-wife's interest in his pension benefits by filing for bankruptcy. *In re* Gendreau, 122 F.3d 815, 817 (9th Cir. 1997). The court determined the ex-wife's interest was fixed at the time of the divorce decree. *Id.* at 819. Therefore, filing for bankruptcy post-divorce but prior to the QDRO was immaterial. *Id.* In *Tise*, the court held that death occurring post-divorce, but before the QDRO, was likewise immaterial. 234 F.3d at 426.

163 193 F.3d 185 (3d Cir. 1999).

164 *Id.* at 189.

165 *Id.* at 187.

166 *Id.*

167 *Id.* at 187–88. Both Robichaud and the attorney who prepared the original divorce agreement testified that they never discussed the survivor annuity during the divorce negotiations. *Id.* at 188.

168 *See id.* (noting that the lower court granted the *nunc pro tunc* order because the divorce was amicable and further stated that whether there are any benefits payable is a question of federal law).

The Third Circuit rejected the amended divorce decree and denied Robichaud any interest in Samaroo's survivor annuity.[169] Arriving at this conclusion, the court combined the finding in *Hopkins* with the Supreme Court of New Jersey's decision in *Ross v. Ross*.[170] Like *Samaroo*, *Ross* denied a participant's former spouse the ability to amend a divorce decree after the participant's death.[171]

The *Samaroo* court justified denying the state-issued *nunc pro tunc* order by articulating the distinction between the state's ability to affect the legal relationship between Robichaud and Samaroo, and the state's inability to affect the participant's pension plan, which is within the scope of federal law.[172] The *Samaroo* court also rejected Robichaud's claim that denying her amended decree would result in the plan cheating Samaroo out of any benefits for participating in the plan.[173] However, the court attempted to mitigate the broad effects of its decision by limiting its holding to the particular facts of that case.[174]

Despite the steps taken by the court to minimize the scope of its holding, Judge Mansmann wrote a dissenting opinion characterizing the decision as a determination "that a state court's power to enter or modify a [QDRO] with respect to a participant's interest in a pension plan ends with the participant's death."[175] He further stated, "this holding will work an unwarranted interference with the states' ability to administer their domestic relations law."[176] Judge Mansmann's concern was valid because district courts without circuit court guidance have relied on *Samaroo* to hold that "rights to survivor's benefits are fixed as [of] the participant's death."[177]

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169 *Id.* at 191.

170 *Id.* at 190; *see also* Ross v. Ross, 705 A.2d 784, 794 (N.J. Super. Ct. App. Div. 1998) (holding that a divorce decree cannot vest the plan's rights to the alternate payee unless a QDRO exists at the time of the divorce).

171 *See Ross*, 705 A.2d at 797 (holding that a QDRO could not be entered after the participant's death).

172 *Samaroo*, 193 F.3d at 191; *see also* 29 U.S.C. § 1144(a) (2006) (establishing that the provisions of this chapter supersede all state laws).

173 *Samaroo*, 193 F.3d at 190. Although not stated directly, this may have been the court's attempt to recognize the factual distinction of *Samaroo* from both *Hopkins* and *Ross* regarding the lack of competing beneficial interests.

174 *Id.* at 190 n.3.

175 *Id.* at 191–92 (Mansmann, J., dissenting).

176 *Id.* at 192 (Mansmann, J., dissenting).

177 Stahl v. Exxon Corp., 212 F. Supp. 2d 657, 670 (S.D. Tex. 2002) (alteration in original); *see supra* note 163 and accompanying text (noting that the court determined that the former spouse's interest was fixed at the time of the divorce decree). Courts relying on *Samaroo* are failing to heed the court's own limitation of the application. In *Guzman*, the court directly applied *Samaroo*, and distinguished the circumstances from *Tise*, without even acknowledging the *Samaroo* limitation. Guzman v. Commonwealth Edison Co., No. 99-C-

The Third Circuit's decision in *Samaroo* was an extension of logic from *Hopkins*, similar to the extension the Ninth Circuit took in *Tise* by applying *Gendreau* beyond a bankruptcy situation.[178] However, *Samaroo* and the subsequent cases that have applied its reasoning are a significant departure from *Tise* and represent an overwhelmingly minority faction concerning the question of whether a QDRO can be filed posthumously.[179]

IV. WILL IT TAKE A HERCULEAN EFFORT TO DEFEAT THIS THREE-HEADED BEAST?: A CONCLUSION

So, what will become of our middle-aged woman if her ex-husband dies before his retirement assets are divided? According to current jurisprudence, the answer depends on where her husband worked, whether she notified her ex-husband's employer before his death, and the legal jurisdiction in which he died. In short, who knows? We do know this: America is made up of an aging population of individuals who have worked anywhere from seven to twelve jobs during their lives and are at least forty percent likely to get divorced.[180] These statistics

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582, 2000 WL 1898846, at *3 (N.D. Ill. Dec. 28, 2000). Furthermore, cases such as *Thuney* are applying *Samaroo* for the principal that posthumous application of QDROs creates actuarial uncertainty from the plan. *See* Thuney v. Locals 302 & 612 of the Int'l Union of Operating Eng'rs-Emp'rs Const. Indus. Ret. Plan, No. C05-1539RSL, 2007 WL 1655116, at *3–4 n.3 (W.D. Wash. June 4, 2007) (applying *Samaroo* and noting that altering the benefits after the triggering event occurred "would wreak actuarial havoc on administration of the Plan" (quoting *Samaroo*, 193 F.3d at 190) (internal quotation marks omitted)). However, this is a minor point that *Samaroo* adopted from a footnote in *Hopkins*, and neither court devoted any analysis to justify its conclusion that the actuarial uncertainties are too great for the plan administrators to bear.

178 *See* Files v. ExxonMobil Pension Plan, 428 F.3d 478, 487 n.12 (3d Cir. 2005) (discussing its reliance on the reasoning established in *Hopkins*).

179 *See supra* note 161 (reiterating that the REA prohibits a participant from changing beneficiaries after retirement). *Compare Samaroo*, 193 F.3d at 190 (holding that an alternate payee's right to obtain a QDRO is fixed at the death of the plan participant), *with* Trs. of the Dirs. Guild of Am.-Producer Pension Benefits v. Tise, 234 F.3d 415, 426 (9th Cir. 2000) (holding that a state court, via *a nunc pro tunc* order, can issue a DRO that the plan administrator can determine is a QDRO after the participant's death). No other circuit court has adopted *Samaroo*'s rationale. District courts, without any circuit court precedent, are the only courts that have expressly adopted the rational of *Samaroo*. *But see* R.A.F. *ex rel.* Woodall v. S. Co. Pension Plan, 2008 WL 2397391, at *6 (M.D. Ala. June 10, 2008) (recognizing the absence of authority within the Eleventh Circuit, yet holding in line with the majority that ERISA does not require a plan administration to receive the QDRO before the participant's death).

180 *See Economic News Release: Employee Tenure Summary*, BUREAU LABOR STATISTICS (Sept. 14, 2010), http://www.bls.gov/news.release/tenure.nr0.htm (providing that as of January 2008, the average employee tenure was 4.1 years); *see also* Gayle Fee, Laura Raposa & Megan Johnson, *Arnold's Cheating to Blame?*, BOS. HERALD, May 12, 2011, at 16 (providing

reveal that a problem, which once affected only a small few, will increase in frequency.

A. Don't Be Charmed by the Courts' Siren Song

A recent decision from the California Court of Appeals accurately stated that there *appear* to be two lines of authority regarding whether an alternate payee is required to obtain a QDRO before the participant's death.[181] As this analysis reveals, the apparent two-line split of authority is merely a distraction, like the enchanted songs of the Sirens distracting Odysseus.[182] The important question is not whether a plan can accept a QDRO posthumously, but whether it is necessary for the plan to have notice of the forthcoming QDRO before the participant's death. This is the issue that even posthumous-permitting jurisdictions cannot fully agree upon, and this is why focusing merely on the first issue will leave a beneficiary shipwrecked without the benefits he or she deserves.

While other courts have adopted *Samaroo*'s conclusion that a QDRO should not be immortal, this is a minority position built on a foundation of quicksand. First, following *Samaroo* is inconsistent with the Third Circuit's unwillingness to broadly examine the legal issues and instead limit its holding to the facts before it.[183] Moreover, not withstanding *Samaroo*, the Third Circuit has seen fit to side with *Tise* and its progeny on occasion.[184] Second, the courts that have done so currently are at the district level and have not received guidance from their respective circuit courts. Thus, there is opportunity for their respective circuit courts to overturn these minority opinions and further strengthen the posthumous-permitting coalition. Furthermore, circuit courts resolving this issue for the first time are likely to continue moving away from *Samaroo*, at least in part, because there is statutory support for the idea of a QDRO that survives death. Primarily, Congress permits time for an alternate payee to perfect a QDRO,[185] and there is no evidence Congress

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that in general, divorce rates have improved in the last decade, but the likelihood of divorce for individuals over fifty years old has increased dramatically).

181 *In re* Marriage of Padgett, 91 Cal. Rptr. 3d 475, 483 (Cal. Ct. App. 2009).

182 HOMER, *supra* note 1, at 35–50.

183 *See Samaroo*, 193 F.3d at 190 n.3 ("Our holding and opinion are limited to the particular facts before us, and it is not necessary that we reach the broader issue expressed in the dissent's characterization of our holding.").

184 *See* Files v. ExxonMobil Pension Plan, 428 F.3d 478, 487 (3d Cir. 2005) (holding QDROs need not be in place before death so long as the QDRO is enforcing a separate interest in the pension plan that existed before death). Although *Files* limits the applicability of *Samaroo*, the court did not overrule it. *Id.* The court specified that there are factual circumstances in which it would be controlling. *Id.*

185 29 U.S.C. § 1056(d)(3)(H)(iv)–(v) (2006); *see also* Trs. of the Dirs. Guild of Am.-Producer Pension Benefits Plans v. Tise, 234 F.3d 415, 421 (9th Cir. 2000) ("[T]he statute specifically

intended the participant's death to automatically cut off the eighteen-month correction period.[186]

This is why the mortality/immortality debate is not nearly as problematic as whether there are conditions on immortality, namely plan notice. To date, courts tackling this issue have turned to the pages of the particular retirement plan in question for the answer. These cowardly acts would appall Apollo. Determining whether notice is required based on the plan provisions takes authority away from both Congress and the judicial system, placing it in the hands of plan administrators.[187] However, as this Article points out, giving plan administrators this immense power and placing them on Mount Olympus will lead to the unpredictability, lack of uniformity, and abuse of funds that ERISA sought to eliminate.[188]

Who then can fill the shoes of Odysseus and bring this Odyssey to an end? Through the *Tise* court's refusal to even address the question and the *Patton* court's determination of the issue—by looking to the plan provisions—these courts have implicitly determined that the statutory language of ERISA in its current form is insufficient.[189] There is merit to that conclusion given the specificity with which Congress has detailed other ERISA provisions.[190]

If the statutory language is insufficient, then Congress should amend ERISA and clarify whether the participant must put the plan administrator on notice of the pending QDRO before the participant's

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provides for situations in which no valid QDRO issues until after benefits become payable.").

186 *See* R.A.F. *ex rel.* Woodall v. S. Co. Pension Plan, 2008 WL 2397391, at *10 (M.D. Ala. June 10, 2008) (recognizing an alternate payee may perfect a QDRO within the eighteen-month time period and failing to grant relief to the plaintiff because her QDRO was not submitted within that time frame).

187 In the recent decision, *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, the Supreme Court of the United States characterized it as a "bright-line requirement to follow plan documents in distributing benefits" when the court-determined plan administrator documents trump even federal common law. 555 U.S. 285, 302 (2009).

188 In addition, it fails to satisfy the rationale the Court described in *Kennedy*, which was to avoid forcing administrators "to examine a multitude of external documents that might purport to affect the dispensation of benefits, and . . . draw[ing them] into litigation like this over the meaning and enforceability of purported waivers." *Id.* at 301 (citation omitted) (quoting Estate of Altobelli v. Int'l Bus. Machs. Corp., 77 F.3d 78, 82–83 (4th Cir. 1996) (Wilkinson, C.J., dissenting)).

189 In *Files v. ExxonMobil Pension Plan*, the Third Circuit suggested that ERISA's silence on the subject of prior notice was sufficient indication that it is not required. 428 F.3d 478 (3d Cir. 2005). However, in this particular case, the plan did have notice before death, and the court refrained from determining whether that factor was relevant to the outcome of the case. *Id.* at 491.

190 *See supra* Parts I.A–C (discussing and presenting the evolution of the statutory provisions contained in ERISA).

death. Correcting the problem uncovered and examined in the paper doesn't require a major statutory overhaul, nor will it undermine the general principals of ERISA's statutory scheme.[191] However, it will provide plan administrators with a more clearly defined set of instructions from which to operate. Congress should take this opportunity to overrule *Samarro* and its progeny by confirming that an alternate payee has eighteen months after the participant's death to perfect a DRO and convert it into a QDRO.

Congress enacted ERISA, at least partially, with the intent to unify the rules under which retirement plans operate.[192] So long as this debate is unresolved, Congress' intent goes unfulfilled. However, until Congress takes action, there are steps each of the relevant parties can take to mitigate the losses that may arise due to the uncertainties surrounding this issue.

B. Follow These Directions to Avoid Being Blown Off Course

Alternate payees should make it a priority to put the plan administration on notice as soon as possible after receiving a state court order—the DRO. The alternate payee should do this regardless of whether the DRO complies with the technical and substantive requirements of a QDRO. This will help ensure that the alternate payee will avoid having a claim fail if the plan provisions, or the court of proper jurisdiction, require notice before the participant's death to accept a posthumous QDRO.

State court judges can ease the burden of this problem by becoming familiar with the requirements for a DRO to qualify as a QDRO.[193]

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[191] *See Kennedy*, 555 U.S. at 301 ("ERISA's statutory scheme 'is built around reliance on the face of written plan documents.'" (quoting Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 83 (1995))).

[192] Heideman v. Gen. Motors Hourly-Rate Emps. Pension Plan, No 00-CV-0416A(SR), 2004 WL 1498198, at *6 (W.D.N.Y. Feb. 6, 2004) (describing ERISA as a federal scheme designed for the protection of pension plan participants and their employees with the intent to ensure the employees' benefits will be available upon retirement); *see also* Brian A. Perez-Daple, Comment, *Legal Reimbursement Claims by ERISA Plan Fiduciaries*, 72 U. CHI. L. REV. 1103, 1106 (2005) (noting that Congress sought to protect retirees' pensions "through a uniform federal administrative scheme"); Nancy L. Pirkey, Note, *The Availability of Jury Trials in ERISA Section 510 Actions: Expanding the Scope of the Seventh Amendment*, 27 VAL. U. L. REV. 139, 139 (1992) ("ERISA was designed to replace the patchwork of state and federal laws that failed to adequately protect employees' jobs and benefits by creating a comprehensive and all-encompassing federal scheme to safeguard employee benefits.").

[193] *Contra* Metro. Life Ins. Co. v. Wheaton, 42 F.3d 1080, 1085 (7th Cir. 1994) ("It is asking too much of domestic relations lawyers and judges to expect them to dot every *i* and cross every *t* in formulating divorce decrees that have ERISA implications. Ideally, every domestic relations lawyer should be conversant with ERISA, but it is unrealistic to expect all of them to be.").

Fortunately, Congress has specifically articulated these requirements,[194] so this is not as cumbersome as it may seem. Properly drafted DROs will reduce the likelihood of a plan administrator rejecting a DRO for lack of compliance with ERISA. Equally important, when issuing a DRO, the court should always reserve jurisdiction to make amendments if necessary.

Finally, pension plan administrations need to be aware of the responsibility courts have placed upon them through this judicial deference. If not already in place, plan administrators need to establish and clearly articulate policies concerning how the plan will treat DROs received after a participant's death. This, along with prompt action by alternate payees who possess court orders that have been written by judges familiar with QDRO requirements, will reduce the injustices that occur when former spouses and children are denied the financial support that ERISA intended to offer them. Will it take a Herculean effort to resolve the problem? No, it will take a Herculean effort to maintain order until the problem is solved.

194 29 U.S.C. § 1056(d)(3)(C)–(D) (2006).