

ERISA
401(k)
QDRO
29 U.S.C. § 1056(d)

In re Carlton, Case No. 300-40223

8/16/01

ELP

unpublished

Before debtor filed her bankruptcy petition, she was awarded one-half of her former husband's 401(k) pension plan in a dissolution judgment. She did not obtain a Qualified Domestic Relations Order before bankruptcy. The trustee sought to sell to debtor's former husband debtor's claim against him for the one-half of the pension plan, and debtor objected. Debtor had not claimed an exemption in her right to a portion of the plan.

The court reviewed the ERISA provisions relating to the transfer of rights in pension plans through QDROs, and concluded that the trustee could not sell debtor's rights. Under Ninth Circuit authority, the entry of a dissolution judgment that awards a spouse a portion of an ERISA-qualified pension plan gives the spouse an interest in the plan, although the interest is not enforceable against the plan until a QDRO is entered. Debtor had a right to return to state court to obtain a QDRO. No one else could exercise that right, because under ERISA, no one other than a spouse, former spouse, child or other dependent can be an alternate payee of an ERISA-qualified plan. Because debtor could not transfer her right to obtain a QDRO to any other party, no one other than debtor could obtain an enforceable interest in the plan. The trustee could not obtain a QDRO, therefore the trustee also could not release debtor's right to obtain a QDRO. The court sustained debtor's objection to the trustee's notice of intent to sell debtor's interest in the 401(k) plan.

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UNITED STATES BANKRUPTCY COURT

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FOR THE DISTRICT OF OREGON

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In Re:

) Bankruptcy Case No.

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MARCI JO CARLTON,

) 300-40223-elp7

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Debtor.

) MEMORANDUM OPINION

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Debtor objects to the trustee's intent to sell her claim

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against her former husband for one-half of his 401(k) plan, which

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was awarded to her in a dissolution judgment. For the reasons that

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follow, I conclude that debtor has no claim against her former

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husband, but rather has an interest in the 401(k) plan and a right

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to obtain an order making that interest enforceable against the

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plan. The trustee has no claim against the former husband to sell,

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and cannot sell debtor's right to obtain the order, because that

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right is not transferable. Therefore, debtor's objection will be

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sustained.

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FACTS

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Debtor's marriage to Lawrence Carlton (Carlton) was dissolved

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before she filed her bankruptcy petition. The Judgment of

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Dissolution provided, as relevant to this opinion:

1 Wife shall be awarded 50 percent of husband's 401-K Plan
2 as of April 24, 2000 and in addition thereto, the sum of \$4,815
3 as an equalizing division of other retirement benefits awarded
4 to husband. These funds, including the \$4,815 equalizing
 division of other retirement plans, shall be transferred from
 husband's 401-K to wife by presentation of a Qualified Domestic
 Relations Order (QDRO).

5 The \$4,815 was for debtor's share of Carlton's two Individual
6 Retirement Accounts. The state court issuing the judgment retained
7 jurisdiction to enter any necessary QDRO. Debtor did not obtain a
8 QDRO before she filed her bankruptcy petition.

9 In her Schedule of Personal Property (Schedule B), debtor
10 listed her interest in the 401(k) plan as a contingent unliquidated
11 claim against Carlton. She did not claim her interest in the 401(k)
12 plan as exempt on her Schedule C (Property Claimed Exempt).¹

13 The trustee filed a notice of intent to sell to Carlton for
14 \$5,000 debtor's claim against him for one-half of his 401(k)
15 account. Debtor objects.

16 ISSUE

17 Whether the trustee may sell debtor's right to a portion of
18 Carlton's 401(k) plan.

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21 ¹ In an earlier proceeding before this court, debtor argued
22 that she had claimed the interest as exempt. I rejected that
23 argument at the hearing. In her Schedule B, debtor listed her PERS
24 (Public Employees Retirement System) account as an asset under the
25 category "Interests in IRA, ERISA, Keogh, or other pension or profit
26 sharing plans." She listed "claim against ex-husband for 1/2 401(k)
 savings (14,000) awarded through divorce" under the category "Other
 contingent and unliquidated claims." She claimed the PERS account
 as exempt pursuant to ORS 23.170, 239.261, and 237.201. She did not
 claim any exemption in the 401(k) account.

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DISCUSSION

The parties' arguments have evolved during the pendency of debtor's objection to the trustee's notice of sale and have now crystallized. Debtor argues that the dissolution judgment created for her an interest in Carlton's 401(k) plan, which interest is not property of the estate subject to sale because of the anti-alienation provisions of ERISA.² The trustee responds that debtor does not have an interest in the plan until there is a QDRO, and because debtor did not obtain a QDRO before bankruptcy, she had no interest in the plan but only a claim against Carlton on the date of the petition. That claim is property of the estate that the trustee can sell. Resolution of this matter requires a general understanding of ERISA as applied to domestic relations judgments, and a careful consideration of exactly what it is that the trustee seeks to sell.

A. ERISA and QDROs

The Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq., (ERISA) is a comprehensive statute designed to promote the interests of employees and their beneficiaries by regulating the creation and administration of employee pension and benefit plans. Pomeroy v. Johns Hopkins Medical Services, Inc., 868 F. Supp. 110, 111 (D. Md. 1994). ERISA contains certain safeguards and

² Section 541(c)(2) provides that restrictions "on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable" in bankruptcy.

1 protections that ensure that the assets of a plan are “held for the
2 exclusive purposes of providing benefits to participants in the plan
3 and their beneficiaries.” Boggs v. Boggs, 520 U.S. 833, 845
4 (1997) (quoting 29 U.S.C. § 1103(c)(1)). One such safeguard is a
5 general bar on the assignment or alienation of pension plan
6 benefits. See 29 U.S.C. § 1056(d)(1).³

7 ERISA contains an exception to the bar on alienation or
8 assignment of pension plan proceeds for individuals who obtain
9 Qualified Domestic Relations Orders (QDRO). 29 U.S.C. § 1056(d)(3);
10 Trustees of the Directors Guild of America-Producer Pension Benefits
11 Plans v. Tise, 234 F.3d 415, 419-420 (9th Cir. 2000). The exception
12 was created to enhance protection to spouses and dependent children
13 if there is a divorce or separation. Boggs, 520 U.S. at 847.

14 A QDRO is a specific type of domestic relations order (DRO).
15 Directors Guild, 234 F.3d at 420. Under ERISA, a DRO is any
16 judgment, decree, or order made pursuant to state domestic relations
17 law that “relates to the provision of child support, alimony
18 payments, or marital property rights to a spouse, former spouse,
19 child, or other dependent of a participant[.]” 29 U.S.C.
20 § 1056(d)(3)(B)(ii)(I-II).

21 A DRO is a QDRO if it “creates or recognizes the existence of
22 an alternate payee’s right to, or assigns to an alternate

23 ³ Section 1056(d)(1) provides that “[e]ach pension plan
24 shall provide that benefits provided under the plan may not be
25 assigned or alienated.” The parties agree that Carlton’s 401(k)
26 account is a pension plan. See 29 U.S.C. § 1002(2)(A) (pension plan
includes a plan or fund that provides retirement income to
employees).

1 payee^[4] the right to, receive all or part of the benefits
2 payable with respect to a participant under a[n ERISA] plan,"
3 29 U.S.C. § 1056(d)(3)(B), and does not (1) require the plan to
4 provide any type of benefit not otherwise provided, (2) require
5 the plan to provide increased benefits, or (3) require benefits
6 to be paid to an alternate payee which must be paid to another
7 alternate payee under another QDRO, 29 U.S.C. § 1056(d)(3)(D);
8 see also Samaroo v. Samaroo, 193 F.3d 185, 191 (3d Cir. 1999).
9 Finally, a QDRO must specify the name and mailing address of
10 the alternate payee and the affected plan participant, the
11 amount or percentage of the participant's benefits to be paid
12 or the means by which that amount will be determined, the
13 number of payments or time period to which the order applies,
14 and the plan to which the order applies. 29 U.S.C.
15 § 1056(d)(3)(C).

16 Directors Guild, 234 F.3d at 420 (footnote omitted). An individual
17 who qualifies as an alternate payee under a QDRO "shall be
18 considered for purposes of any provision of this chapter a
19 beneficiary under the plan." 29 U.S.C. § 1056(d)(3)(J).

20 Primary responsibility for determining whether a DRO is a
21 QDRO that establishes obligations for an ERISA plan rests with
22 the plan itself. 29 U.S.C. § 1056(d)(3)(G). Upon obtaining a
23 domestic relations order in a state court proceeding, an
24 alternate payee who seeks to establish a right to payment
25 pursuant to that order from an ERISA-covered benefit plan must
26 present the order to the pension plan administrator for a
determination of whether it is a QDRO. An alternate payee who
thus submits a domestic relations order to an ERISA plan places
the plan on notice that the DRO may be a QDRO, and that, under
state law, the alternate payee may be entitled to some or all
of the benefits that have accrued in the plan with respect to a
participant.

27 Directors Guild, 234 F.3d at 420 (footnote omitted). If the DRO is
28 determined to be a QDRO, then the alternate payee may enforce the
29 pension award against the pension plan. Id. at 421.

30 ⁴ An "alternate payee" is "any spouse, former spouse, child,
31 or other dependent of a participant who is recognized by a domestic
32 relations order as having a right to receive all, or a portion of,
33 the benefits payable under a plan with respect to such participant."
34 29 U.S.C. § 1056(d)(3)(K).

1 B. Debtor's interest arising from the dissolution judgment

2 The trustee asserts that because debtor never obtained a QDRO,
3 she has no interest in Carlton's 401(k) plan itself, but only a
4 claim against Carlton for the value of one-half of the 401(k)
5 account. According to the trustee, because this claim became part
6 of the bankruptcy estate when debtor filed her chapter 7 case, he
7 should be allowed to sell this claim to Carlton for the benefit of
8 the estate.

9 The dissolution judgment awarded debtor 50 percent of Carlton's
10 401(k) plan. When the judgment was entered, "the state court
11 created the wife's interest in the husband's pension plan, and
12 correspondingly limited the husband's interest in it[.]" Directors
13 Guild, 234 F.3d at 421. The state court judgment created in debtor
14 an interest in the 401(k) plan. In re Gendreau, 122 F.3d 815, 818
15 (9th Cir. 1997); Directors Guild, 234 F.3d at 421. Contrary to the
16 trustee's argument, the dissolution judgment creates the interest in
17 the plan. As the Ninth Circuit explained,

18 The QDRO provisions of ERISA do not suggest that [wife] has no
19 interest in the plans until she obtains a QDRO, they merely
20 prevent her from enforcing her interest until the QDRO is
obtained.

21 Gendreau, 122 F.3d at 819. Thus, debtor "does not have an unmatured
22 'debt' against [husband] . . .; rather, [wife] has a claim to her
23 own interest in the plans that will be enforceable when the domestic
24 relations order is approved as a QDRO." Id. Debtor's claim to
25 Carlton's 401(k) plan is not a claim against Carlton but instead is
26 a claim against the plan itself. The dissolution judgment gave

1 debtor the right to obtain a QDRO that would make that claim
2 enforceable against the plan.

3 The trustee argues that the Supreme Court overruled Gendreau
4 and held that a former spouse is not a beneficiary of an ERISA-
5 qualified pension plan, and therefore not protected by the anti-
6 alienation provisions of ERISA, unless and until a QDRO is entered.
7 He relies on Boggs v. Boggs, 520 U.S. 833 (1997). In that case, the
8 Supreme Court explained that "ERISA confers beneficiary status on a
9 nonparticipant spouse or dependent in only narrow circumstances
10 delineated by its provisions," including the QDRO provisions
11 relating to protecting property interests of nonparticipant spouses.
12 520 U.S. at 846. Without a QDRO, the Court noted, a nonparticipant
13 spouse is not a beneficiary of the pension plan. Id. at 847.

14 The trustee is wrong that Boggs overruled Gendreau. First, the
15 Ninth Circuit's decision in Gendreau was issued two months after the
16 Supreme Court decided Boggs. Boggs could not have overruled a
17 decision that had not yet been issued. Second, the Ninth Circuit
18 has since reiterated its understanding that a state domestic
19 relations order can create an interest in an ERISA-qualified pension
20 plan even before a QDRO is entered. See Directors Guild, 234 F.3d
21 415; Stewart v. Thorpe Holding Co. Profit Sharing Plan, 207 F.3d
22 1143, 1156 (9th Cir. 2000). I read those cases as recognizing that
23 a former spouse can obtain an interest in an ERISA-qualified plan
24 despite the fact that the interest will not be enforceable against
25 the plan until a QDRO is entered. That proposition is not
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1 inconsistent with the rule set out in Boggs that a nonparticipant
2 spouse is not a beneficiary of the plan until a QDRO is entered.

3 Debtor does not have a claim against Carlton. What debtor has
4 is a right under the dissolution judgment to return to state court
5 to obtain a QDRO, which would make her interest in the 401(k) plan
6 enforceable. Gendreau, 122 F.3d at 818, 819. The entry of a QDRO
7 is purely ministerial with respect to the division of the 401(k)
8 plan asset between debtor and Carlton; the lack of a QDRO does not
9 affect debtor's rights under the dissolution judgment.

10 The right to obtain a QDRO is personal to debtor. She could
11 not transfer that right to another party, because no other party
12 could get a QDRO. A QDRO is a judgment, order or decree that
13 creates or recognizes the right of an alternate payee to benefits
14 under the plan. 29 U.S.C. § 1056(d)(3)(B). The trustee would have
15 no right to intervene in the dissolution proceeding to seek a QDRO
16 from the domestic relations court. Further, an alternate payee is a
17 "spouse, former spouse, child, or other dependent of a
18 participant[.]" 29 U.S.C. § 1056(d)(3)(K). Neither the trustee nor
19 anyone to whom debtor might transfer the right to obtain a QDRO
20 would qualify as an alternate payee, and therefore no QDRO could
21 issue to anyone other than debtor. As a result, no one other than
22 debtor could obtain an enforceable interest in the 401(k) plan.

23 Because the trustee could not obtain a QDRO, which would
24 realize value for the estate, neither should he be able to release
25 debtor's right to obtain that QDRO. The trustee cannot release a
26 right that he does not have. Therefore, I will deny the trustee's

1 request to sell debtor's claim against Carlton, which I interpret to
2 also encompass a request to sell debtor's rights in the plan.

3 CONCLUSION

4 The dissolution judgment in this case gave debtor an interest
5 in Carlton's 401(k) plan and the right to obtain a QDRO that would
6 make that interest enforceable, but it did not give debtor a claim
7 against Carlton personally. The trustee has no claim against
8 Carlton to sell, and the trustee cannot sell debtor's right to
9 obtain a QDRO, because that right is not transferable. Debtor's
10 objection to the trustee's notice of intent to sell her claim is
11 sustained. Mr. Ammirati should, within 10 days of the date of this
12 Memorandum Opinion, submit an order sustaining the objection.

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ELIZABETH L. PERRIS
Bankruptcy Judge

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16 cc: Kenneth S. Eiler, Esq.
17 Joseph Ammirati, Esq.
United States Trustee

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