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Posthumous *Nunc Pro Tunc* QDROs

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Although the Pension Protection Act of 2006[1] (PPA 2006) and Department of Labor (DOL) regulations[2] implementing it have addressed some of the issues associated with posthumous qualified domestic relations orders (QDROs), the issue of posthumous[3] nunc pro tunc[4] QDROs remains an issue that is not fully resolved, in part because of some of the difficult issues associated with nunc pro tunc orders.[5] A nunc pro tunc order or judgment "relates back in time to when it should have been entered. A nunc pro tunc QDRO may be entered after the death of a party before it was prepared or because of one party's death prior to entry of the judgment of dissolution. The issue arises most frequently with respect to survivor annuity benefits in defined benefit plans,[6] but can also arise with respect to competing claimants in an individual account plan[7] or a participant's entitlement to benefits upon the death of an alternate payee prior to the alternate payee's commencement of benefits.[8] This article discusses several key cases related to these judgments.

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PATTERSON V. CHRYSLER GROUP, LLC

Although the precise extent of the scope of a *nunc pro tunc* order may vary by state, the discussion in *Patterson v. Chrysler Group, LLC*[9] is illustrative. In that case, the plaintiff had initially filed her divorce judgment with the plan in December 1994, which entitled her to one-half of her husband's accrued benefits under the plan, full rights of survivorship, and further provided he could not choose an option that would deprive her of these benefits. At that time, in violation of the divorce decree, her ex-husband had elected a single life annuity with no surviving spouse benefits. In January 1995, the plan denied her request to have the decree treated as a QDRO because it lacked clerical information. The plaintiff did not communicate with the plan again for almost 13 years, shortly after her former husband died. She went back and forth with the plan for a six-year period to remedy the clerical deficiencies in the judgment of divorce and, finally, in February 2014 she obtained a *nunc pro tunc* order adding the missing clerical information. The order was submitted to the plan in March 2014, and the plan denied the order because there was no remaining benefit to be paid under her ex-husband's annuity form of distribution. On February 12, 2015, the plaintiff filed a complaint in the district court for the Eastern District of Michigan. Defendants moved to dismiss on statute of limitations grounds. The district court disagreed and found for plaintiff,[10] but the US Court of Appeals for the Sixth Circuit reversed.

The district court held that, to the extent that plaintiff's claim was based upon defendant's denial of the *nunc pro tunc* order, the claim was not time-barred, as the claim was filed within six years of the action by defendants. The district court did not indicate whether its conclusion was based on the issuance of a *nunc pro tunc* order providing the plaintiff with a new cause of action, or that it reset the statute of limitations. According to the Sixth Circuit, either of those approaches would reflect a misunderstanding of *nunc pro tunc* orders under Michigan law. The Circuit Court indicated that, as in other jurisdictions, Michigan court orders issued *nunc pro tunc* do not retroactively modify substantive rights declared in older court orders. "That is, *nunc pro tunc* orders fix clerical mistakes in old orders. Nunc pro tunc orders do not revise the substance of what has transpired, backdate events, or give rise to new substantive rights, including resetting the statute of limitations."[11] As some courts have expressed this point, *nunc pro tunc* orders "cannot be used to rewrite history."[12] Moreover, from a policy perspective, adherence to the position of the district court would defeat "the clearly understood policy goals of statute of limitations." Under the district court analysis, "no matter how long ago a plan denied a domestic relations order (DRO), the denied claimant could circumvent the statute of limitations and revive his cause of

action by obtaining and submitting a *nunc pro tunc* version of the denied order to the pension plan, force the plan to reiterate its denial, and effectively reset the statute of limitations. In such a world, no claim would ever truly be time-barred, but merely waiting for a *nunc pro tunc* order to issue."[13]

PAYNE V. GM/UAW PENSION PLAN

Payne v. GM/UAW Pension Plan[14] is an early case in which the plan called into question the scope of a *nunc pro tunc* order. The divorce judgment in that case awarded Virginia Payne 45 percent of Donald Payne's pension under the General Motors Pension Plan. Donald died one month later, before any QDRO was submitted to a state court. However, he had signed the QDRO before his death, although the plaintiff did not sign it until June. The QDRO order indicated the plan to pay to plaintiff 45 percent of Donald's monthly retirement benefits. However, the QDRO specifically provided that the alternate payee would not be treated as a surviving spouse for purposes of either a preretirement survivor annuity or a postretirement survivor annuity. The plaintiff then filed a petition for an amended QDRO, and a *nunc pro tunc* order to that effect was issued, which deleted the word "not" from the QDRO, and thus provided that she would be treated as a surviving spouse.

GM's position was that the *nunc pro tunc* order was inconsistent with the divorce judgment. The plaintiff's deposition testimony, and exhibits to her testimony, showed that the plaintiff and Donald had negotiated the terms of their divorce over a 20-month period, from June 1991 to February 1993. Although the plaintiff wanted the divorce judgment to provide for survivorship benefits, Donald was equally insistent that she not be designated as surviving spouse. At a February 11th hearing, Donald agreed to the plaintiff's receipt of 45 percent of his GM retirement benefits, which became part of the divorce judgment. The district court disagreed. First, it stated that GM provided no authority for the proposition that a QDRO is invalid if it is inconsistent with a divorce judgment. Second, the language of the divorce judgment was imprecise. The court indicated that an award of "45 percent of the husband's pension" could mean 45 percent of the benefits that he would eventually receive, or a 45-percent survivor's benefit, or both. The district court then made a more general statement: "More importantly, to the extent there is any inconsistency between the divorce judgment and the amended QDRO, Judge Ransom decided this issue in Virginia's favor when he granted her petition to amend the QDRO to make her the sole surviving spouse. A federal court must give full faith and credit to a state court judgment. Whether Judge Ransom's

ruling was correct or not, the court is bound to respect it."[15] That is, if the order would have been recognized by another court in the state, then the federal court would need to recognize it.

GM also argued that the amended QDRO constituted a fraud on the court that issued it and, thereby, turned the divorce order on its head. The district court's response to that complaint was that GM, under Michigan court rules, could have petitioned the court to vacate the judgment, even though it was not a party to the divorce action. However, GM never took any such action and, therefore, allowed Judge Ransom's order to become a final uncontested order of a state court.

PATTON V. DENVER POST CORP.

In *Patton v. Denver Post Corp.,*[16] the district court expressed its view that the concern that state courts will abuse their authority and issue improper *nunc pro tunc* orders was unfounded. The circumstances under which *nunc pro tunc* orders may be entered under applicable state law are narrow, and divorce courts are bound by the standards articulated under state law. Also, in general, the plan will not be a party to the motion for a *nunc pro tunc* order and, at least under Colorado law, would not be bound by the ruling on that motion. Also, under different circumstances, had the pension funds already vested or been received at the time of the *nunc pro tunc* order, the *nunc pro tunc* order would likely be impermissible under Colorado law and be subject to collateral attack by the plan.

GARCIA-TATUPU V. BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN

Garcia-Tatupu v. Bert Bell/Pete Rozelle NFL Player Retirement Plan[17] presents a more recent and clearer example of the concern regarding *nunc pro tunc* orders. A 1997 marital settlement agreement provided that at the time of the ex-husband's retirement and decision to draw pension benefits, he would pay the plaintiff one third of the net benefits that he receives. The ex-husband had the exclusive right to decide if, when, and how he wished to receive the benefits. The order further provided that "said benefits shall continue to be payable to [plaintiff] subsequent to the death of [ex-husband], if the plan so provides, and if she survives [ex-husband] specifically waives any rights to receive any alimony and/or pension benefits in excess of the amount provided herein."[18] As a result, when the plaintiff's ex-husband died prior to his retirement, the plaintiff was not entitled to any survivor benefits. In response, the plaintiff obtained a 2011 postmortem order that awarded

her 100 percent of the participant's accrued benefit and allowed her to elect the time and form at which the benefit would be paid. That order also provided that "if the Alternate Payee is alive upon the Player's death, the Alternate Payee" is "treated as the Player's surviving spouse for the purpose of awarding death benefits with respect to the Player's remaining benefit under the Retirement Plan."[19] When the plan concluded that this postmortem order did not constitute a QDRO, plaintiff obtained another postmortem order stating that the postmortem DRO entered on December 29, 2011, is hereby ordered *nunc pro tunc* to September 24, 1997." The plan declined to give effect to the *nunc pro tunc* order, and the plaintiff appealed to the district court.

With respect to the postmortem orders, the district court reiterated its observations in an earlier opinion in the case[20] that postmortem orders are not categorically inappropriate for purposes of defining the terms of a QDRO. It explained that such postmortem orders are often necessary to clarify the terms of marital property rights in a divorce setting after the change of circumstances occasioned by a party's death. However, "if the postmortem order purports to increase plan benefits, it will not receive federal recognition as a Qualified Domestic Relations Order." In so analyzing the issue, the district court was following the approach of the US Court of Appeals for the Third Circuit, which will be discussed more fully below.

Defendants took the position—on its face, a quite reasonable one—that the *nunc pro tunc* order must be disregarded because it violated Massachusetts law. In response, the district court discussed the first circuit decision in *Fierro v. Reno*,[21] an immigration decision. In *Fierro*, the US Court of Appeals for the First Circuit stated that "in Massachusetts, as in many other jurisdictions … a *nunc pro tunc* order is appropriate primarily to correct the record at a later date to make the record reflect what the court or other body intended to do at an earlier date but did not get around to doing through some error or inadvertence."[22] The First Circuit in *Fierro* also referenced case law "in the context of probate court orders, holding that these orders are controlling for purposes of federal tax liability only when the federal court determines that they are proper under state law."[23] Thus, the Court of Appeals could have chosen to disregard the probate court's modification as a misapplication of Massachusetts law but chose rather to leave the state question undecided and resolve the immigration law question "on a strictly federal ground."[24] The district court, in following *Fierro*, explained that "in the ERISA context, Congress chose to bypass any state law misapplication problem altogether by making the relevant determination about plan benefits one of federal law. Only state court orders—whether post or premortem, *nunc pro tunc*, or simply *nunc*—which do not increase spending beyond the terms of an ERISA plan, will receive federal recognition. That determination is purposefully a matter not of state law

interpretation, or the propriety of post-mortem *nunc pro tunc* orders under state law." Congress sought to avoid the mischief evident in this case when a state law judge enters an order at best inattentive to and at worst in conscious disregard of ERISA plan provisions. Such orders are treated as without force as a matter of federal law in order to assure uniformity in the regulation and administration of the nation's pension system."[25] The First Circuit affirmed in a *per curiam* opinion but because of the specific facts of the case, "we do not opine upon the circumstances in which a *nunc pro tunc* state court domestic relations order entered after the death of a plan beneficiary may be treated as a QDRO."[26]

YALE-NEW HAVEN HOSPITAL V. NICHOLLS

Although at least five Circuit Courts of Appeal have recognized the permissibility of posthumous *nunc pro tunc* orders,[27] there is a difference in approach, at least between the US Court of Appeals for the Second Circuit[28] and the Third Circuit. The *Yale-New Haven Hospital v. Nicholls*[29] case was an interpleader action brought by the hospital to resolve competing claims to death benefits. The fact pattern is one with which practitioners are familiar and indicate one of the reasons that cases involving posthumous *nunc pro tunc* orders are necessary—although obviously, in some cases, the need for a *nunc pro tunc* order results from the premature and totally unanticipated death of the participant.

Harold and Claire Nicholls were divorced in 2008 and entered into a settlement agreement, which was incorporated into their dissolution of marriage. It provided, *inter alia*, that Harold's pension and retirement accounts would be evenly divided between Harold and Claire. The settlement agreement provided that Attorney McMahon would prepare a QDRO to accomplish this, but this QDRO was not prepared, which may have resulted in part from Harold's refusal to cooperate in drafting a QDRO. Harold then married Barbara in 2009 and died in 2012 prior to retiring. After Harold's death, Claire obtained two *nunc pro tunc* orders authorizing the plan administrator to distribute to Claire her portion of Harold's plan benefits, as defined by the settlement agreement. The divisive issue in the case, which resulted in the filing of a dissenting opinion by Judge Wesley, was the competing claim by Barbara Nicholls, which he felt had already vested.

The majority had two grounds for disagreeing with the dissent. First, the majority indicated that the purpose of a *nunc pro tunc* order is to render the order effective as of a prior date. In this case, the *nunc pro tunc* orders were intended to be effective as of the date the judgment for the dissolution of marriage was entered in September 2008. That is, the orders were based on a settlement agreement that had

been entered before Mr. Nicholls' death that specifically contemplated the drafting of a QDRO at a later time. The Second Circuit cited with approval the language of the US Court of Appeals for the Ninth Circuit in *In re Gendreau*[30] that "the QDRO provisions of ERISA do not suggest that [the former spouse] has no interest in the plans until she obtains a QDRO, they merely prevent her from enforcing her interest until the QDRO is obtained." Therefore, the *nunc pro tunc* order, as a valid QDRO, effectively assigned benefits to Claire Nicholls before Harold Nicholls' death and, thus, before any interest in the plans could vest in Barbara Nicholls.

The second basis for the majority's holding reflected a view of plan administration to which very few, if any, plans would adhere. The Second Circuit held that "where a plan administrator must determine whether a DRO is a QDRO, any interest in plan benefits does not vest automatically with a surviving spouse." The Court referenced the 18-month period under ERISA Section 206(d)(3)(H) in which a determination is being made by the plan administrator or a court as to whether a DRO qualifies as a QDRO. Accordingly, "a surviving spouse does not gain an irrevocable right to plan benefits until after a plan administrator has determined that a DRO is not qualified. Up until that point, a surviving spouse can 'lose' his or her putative status as an alternate payee. Thus, Barbara Nicholls did not gain an automatic and irrevocable interest in Mr. Nicholls's plan benefits on the date of his death."[31] The majority opinion recognized that numerous cases have concluded or implied that the surviving spouse benefits are vested in the participant's spouse at the time of the participant's retirement or preretirement death[32] but rejected them because they were purportedly "in tension with" ERISA's grace period provisions.[33]

In his dissent,[34] Circuit Judge Wesley expressed disagreement with the majority on two grounds. His first contention was that the *nunc pro tunc* orders could not serve as valid QDROs because they affected a reassignment of vested benefits from Barbara to Claire, in contravention of ERISA's statutory and regulatory schemes and underlying principles. He disagreed with the majority that plan benefits did not vest in Barbara upon Harold's death. With respect to the majority's first point that a *nunc pro tunc* order effectively assigned benefits to Claire before the date that Barbara could have vested in them, the dissent characterized it as "a conclusion of seismic consequences that cannot possibly be correct. I am aware of no legal authority that permits a state court to issue an order and adopt a legal fiction about the order's existence earlier in time such that the state order so easily thwarts the intricate federal statutory scheme surrounding the anti alienation of benefits."

As an illustration of the difficulties that the logic of the majority opinion could produce, if a state court could adopt the legal fiction that a second QDRO with respect to a plan could be issued prior in

time to the first QDRO, then the originally approved QDRO would violate ERISA Section 206(d)(3)(D)(iii), which precludes a proposed, subsequent QDRO from allocating benefit payments to an alternate payee where a valid prior QDRO has already designated those benefits to another alternate payee.

With respect to the majority's position to vesting, the dissent agreed with the cases that have held that the surviving spouse's benefits vest upon a participant's death. The dissent also noted that three of the Court of Appeals decisions upon which the majority relied (*Files v. Exxon Mobil Pension* Plan,[35] *Patton v. Denver Post Corp.*,[36] and *Hogan v. Raytheon Co*[37]) did not involve a surviving spouse and a former spouse's alternate payee having competing claims to the same benefits, with the Third Circuit explicitly distinguishing *Hopkins*[38] on that basis. The decision of the Ninth Circuit in *Tise*[39] did involve competing claims, but in *Tise* the plan was put on notice of the DRO before the participant's death, and was an integral part of the holding that an alternate payee's providing a plan sponsor with a state DRO issued prior to the participant's death to perfect the DRO into a QDRO thereafter, subject to the 18-month period. It is true that the DOL regulations indicate that there is no distinction between orders filed with the relevant plan fiduciary before the participant's death or thereafter, but the DOL did not apply that rule in a situation in which there were competing claimants. The dissent's view was that courts have relied upon predeath notice "to limit an otherwise unconstrained view of ERISA's grace period provision." With respect to the 18-month grace period for determining whether a DRO is a QDRO, the dissent's view was that "this provision cannot bear the weight the majority places on it … nowhere does the provision purport to affect the vesting of benefits. It speaks only to allowing a plan administrator a grace period to evaluate a DRO after benefits have become payable." With respect to the two defined benefit plans in which Harold Nicholls participated, the dissent believed that they would likely violate the annuity starting date regulations with respect to the timing of benefits, because the DOL had indicated in the preamble to the final regulations implementing the PPA 2006 that even if a proposed QDRO does not require reannuitization, a posthumous reassignment of surviving spouse annuity benefits to a prior spouse would be invalid because it reallocates an already allocated benefit.[40] The majority opinion did not address this issue because it was not raised by either party or in the district court.[41]

SAMAROO V. SAMAROO

The analysis in *Yale New Haven Hospital* draws no distinctions between the shared payment approach[42] and separate interest

approach,[43] which has been the lynchpin of the analysis in the Third Circuit, as set forth in *Samaroo v. Samaroo*[44] and *Files*. In *Samaroo*, the plaintiff sought benefits under her ex-husband's preretirement survivor's annuity. Her ex-husband died at the age of 53 while still an active employee of AT&T. The plaintiff's ex-husband was vested but not yet eligible to receive retirement benefits at the time of his death; if he had a surviving spouse, however, that spouse would be eligible to receive a qualified preretirement survivor annuity. After her ex-husband's death, the plaintiff obtained a *nunc pro tunc* amendment to their divorce decree that created an entitlement to her of the preretirement survivor annuity.[45]

The Third Circuit rejected plaintiff's claim to the preretirement survivor annuity, reasoning that since "annuity provisions of a defined benefit plan are a sort of insurance, based on actuarial calculations predicting the future demands of the plan, determining the right to benefits at the time of the ex-husband's death was necessary to avoid "wreak[ing] actuarial havoc on the administration of the plan."[46] The Court further observed that before his death the plaintiff's ex-husband could have entered a QDRO providing her with these benefits, but upon his death the right to any survivorship benefits lapsed. However, the court did indicate that its holding was limited to the facts of the case.

FILES V. EXXON MOBIL PENSION PLAN

In *Files*, the Third Circuit had occasion to examine the scope of the *Samaroo* holding. In *Files*, the plaintiff's former husband worked for Exxon Mobil and had a fully vested pension. Under a property settlement agreement executed two years after the ex-husband became eligible to receive pension benefits, the plaintiff was given the rights to one-half of his pension benefit and one-half of his savings plan account. The ex-husband died, and the issue was whether the plaintiff was entitled to survivor benefits. The plan administrator in *Files* decided not to treat the property settlement agreement as a QDRO because the agreement did not specifically indicate an award of survivor benefits to the plaintiff and the plaintiff's ex-husband had not yet commenced benefits at the time of his death. The plaintiff then obtained a *nunc pro tunc* order providing for survivor benefits, which the plan administrator also rejected. The district court, relying on *Samaroo*, upheld the plan's determination, but the Third Circuit reversed. In distinguishing *Samaroo*, the Court indicated the decree in the earlier case only gave the ex-wife an entitlement to benefit payments when they were made to the participant, while the property settlement order conveyed to the plaintiff a portion of her

ex-husband's interest in the plan. The plaintiff in *Files* had an interest in one-half of her ex husband's pension through the property settlement agreement, which she had a right to enforce at any time after her husband's 50th birthday, separate and apart from the ex-husband's election regarding the remaining 50 percent.[47] The court did indicate, however, that the analysis would have been different had there been a competing claimant.[48]

NOTES

1. Pub. Law. No. 109-280, Section 1001, 120 Stat. 780 (2006). The Act required the DOL to issue, not later than one year after the date of enactment of the PPA, regulations clarifying certain issues relating to the timing and order of DROs under ERISA Section 206(d)(3).

2. 29 C.F.R. § 2530.206.Final regulations were issued by the DOL on June 10, 2010. The DOL guidance made clear that posthumous *nunc pro tunc* QDROs were permissible, even if the plan was not put on notice of the QDRO until after the participant's death, but did not specifically address QDROs. As a result of the issuance of these regulations, issues with respect to posthumous *nunc pro tunc* orders occur less frequently than before the issuance of such guidance.While those regulations dealt with the time at which a QDRO would be issued, it is not clear that those regulations precluded the issuance of an internal statute of limitations.Thus, in *Castanon v. UPS/IBT Full-Time Employee Pension* Plan, 2017 WL 4863238 (N.D. Ga. August 4, 2017), the court considered whether a plan properly rejected a benefit request based upon a proposed QDRO because she had "more than a sufficient period of time" to submit a QDRO after her divorce andbefore her husband's death but failed to do so-a period of 10 years.However, because the issue was not briefed by the parties, the district court did not reach a conclusion.See also *Marker v. Northrop Grumman*, 2006 WL 2873191, fn.2 (N.D. Ill. October 4, 2006) (assuming without deciding that QDRO procedures under an ERISA plan could establish a deadline for the submission of QDROs).

3. Obviously a *nunc pro tunc* QDRO order can also be issued during a participant's lifetime. See DOL Advisory Opinion Letter 2000-09A (July 12, 2000).

4. With respect to the meaning of *nunc pro tunc* in *Fierro v. Reno*, 217 F. 3d 1(1st Cir. 2000), the First Circuit stated that "Like many other concepts in the law wrongfully assumed to have a fixed meaning, 'nunc pro tunc' is a somewhat loose concept, like 'jurisdiction and waiver' used somewhat differently by different courts in different contexts.Literally meaning "now for then" (in Latin) it is a phrase typically used by courts to specify that an order entered at a later date be given effect retroactive to an earlier date-that is, it should be treated for legal purposes as if entered on the earlier date. The critical question is not the intended effect of the phrase but in what circumstances a court may properly order that a new judgment be given effect nunc pro tunc."

5. Not all issues with respect to posthumous *nunc pro tunc* QDROs are difficult. For example. in *Castanon v UPS/IBT Full-Time Employee Pension Plan*, 2017 WL 4863238 (N.D. Ga. August 4, 2017), it was not surprising that the district court held that a 2012 posthumous *nunc pro tunc* order could not be taken into account when it was never submitted to the plan administrator.

6. As the district court stated in *Stahl v. Exxon Corporation*, 212 F. Supp. 2d 657 (S.D. Tex. 2002), "Unfortunately, failure to include a survivorship provision in the QDRO often goes undetected until the participant dies or retires, that is, when the survivorship benefits irrevocably vest in the current spouse and it is too late to do anything about it."

7. *See, for example, IBM Savings Plan v. Price*, 349 F. Supp. 2d. 854 (D. Vt. 2004).

8. *Cingrani v. Sheet Metal Workers Local No. 73 Pension Fund*, 2015 WL 8780620 (N.D. Ill. December 15, 2015).

9. *Patterson v. Chrysler Group, LLC,* 845 F. 3d 756 (6th Cir.).

10. *Patterson v. Chrysler Group, LLC*, 2016 WL 627886 (E.D. Mich. February 17, 2016).

11. *Patterson v. Chrysler Group, LLC,* 845 F. 3d 756. *See also Mack v. Kirkenmeister, CPA*, 2009 WL 196247 (D. Nev. January 23, 2009), noting that the state court, in issuing its *nunc pro tunc* order, "took great care to limit its order to what the record showed the court had already decided."

12. *W.N.J. v. Yocom*, 257 F. 3d 1171,1172 (10th Cir.2001); *Central Laborers' Pension Welfare and Annuity Fund v. Griffee*, 198 F. 3d. 642, 644 (7th Cir. 1999). *Cf.* When a request for information about an individual's entitlement to pension benefits inadvertently omitted one plan in which he was a participant, the addition of the second plan in a *nunc pro tunc* order was more akin to the correction of a clerical error than rewriting of historical facts, because two pension plans existed both at the date of divorce and the date of death. *Patton v. Denver Post Corporation*, 326 F. 3d 1148 (10th Cir. 2003).

13. *Patton v. Denver Post Corporation*, 845 F. 3d 756.

14. *Payne v. GM/UAW Pension Plan*, 1996 WL 943424 (E.D. Mich. May 7, 1996).

15. *Id.*

16. *Patton v. Denver Post Corp.,* 179 F. Supp. 2d 1232 (D. Colo. 2002), *aff'd* 326 F. 3d 1148 (10th Cir. 2003).

17. *Garcia-Tatupu v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 249 F. Supp. 3d 580 (D. Mass. November 1, 2017).

18. *Id.*

19. *Id.*

20. *Garcia-Tatupu v. Bert Bell/Pete Rozelle NFL Player Retirement* Plan, 249 F. Supp. 3d. at 580–582 (D. Mass. 2017).

21. *Fierro v. Reno, supra* n.4.

22. *Id.* at 5.

23. *Id.*

24. *Id* at 6.

25. *Garcia-Tatupu v. Bert Bell/Pete Rozelle NFL Player Retirement Plan, supra* n.17.

26. *Id.*

27. *Files v. Exxon Mobil Pension* Plan, 428 F. 3d 478, 490–491 (3rd Cir. 2005) (*cert. den*. 547 U.S. 1160 (2006); *Patton v. Denver Post Corp.*, *supra* n.12 at 1148,1153–1154 (10th Cir. 2003); *Hogan v. Raytheon Co.*, 302 F. 3d 854,857 (8th Cir. 2002); *Trustees of*

Directors Guild of America Producer Pension Plan v. Tise, 234 F. 3d 415, 421-423 (9th Cir. 2000); *Yale New Haven Hospital v. Nicholls*, 2015 WL 3498771 (2d Cir. 2015). *See also Sun Life Assurance Company of Canada v. Jackson*, 2017 WL 6347728 (6th Cir. Dec. 13, 2017) (not involving a *nunc pro tunc* order, but favorably citing *Nicholls* and *Files* for proposition that posthumous QDROs are permissible).

28. For a discussion generally approving of the majority opinion in *Yale-New Haven Hospital v. Nicholls*, see Thanthic Billings, "Death is Not The End: The Second Circuit Allows Posthumous Division of Pension Benefits in *Yale New Haven Hospital v. Nicholls*," B.C.L. Rev. E. Supp. 51 (2016). The position of the Second Circuit was followed in *Miletello v. RMR,Inc.,* 921 F. 3d 493 (5th Cir. April 16, 2019).

29. *Yale-New Haven Hospital v. Nicholls, supra* n.27.

30. *In re Gendreau*, 122 F. 3d 815, 818 (9th Cir. 1997), *cert. den*. 523 US 1005 (1998).

31. *Yale-New Haven Hospital v. Nicholls, supra* n.27.

32. *See, for example, Rivers v. Central & S.W. Corp*., 186 F. 3d 681, 683–684 (5th Cir. 1999) (holding that "pension benefits irrevocably vested in [surviving spouse] on the date of [participant's] retirement; *Hopkins v. At & T Global Info. Solutions Co*., 105 F. 3d. 153, 155–156 (4th Cir. 1997) (examining ERISA §§ 205 and 206b and concluding that a joint and survivor annuity vests at the time of a participant's retirement); *Carmona v. Carmona*, 603 F. 3d 1041, 1059 (9th Cir 2010); *and Langston v. Wilson McShane Corp*., 828 N.W. 2d 109, 119 (Minn. 2013) ("We find the reasoning of the *Carmona* and *Hopkins* courts to be persuasive and adopt the rule that surviving spouse benefits generally vest under ERISA at the time of the plan participant's retirement.").

33. *Yale New Haven Hospital v. Nichols*, *supra* n.27. The majority also rejected these cases because both the *Hopkins* and *Rivers* cases predated the PPA 2006, although as the dissenting opinion notes, the DOL, in the preamble to the final regulations regarding the timing of QDROs, cited both *Hopkins* and *Rivers* as relevant authority in expressly rejecting the posthumous reassignment of surviving spouse annuity benefits to a prior spouse.

34. Circuit Judge Wesley's opinion was technically a concurrence in part and a dissent in part, but the issues on which he concurred are unrelated to the issue of the validity of posthumous *nunc pro tunc* QDROs.

35. *Files v. Exxon Mobile Pension Plan, supra* n.27.

36. *Patton v. Denver Post Corporation*, *supra* n.12.

37. *Hogan v. Raytheon Co*., *supra* n. 27.

38. *Hopkins*, 914 F. Supp. 1362(D.W.Va), *aff'd* 105 F. 3d 153 (4th Cir. 1997).

39. *Trustees of Directors Guild of America Producer Pension Plan v. Tise, supra* n.27.

40. 75 *Fed. Reg*. 32848. This argument assumes however that Barbara Nicholls vested in the benefit upon Harold Nicholls' death.

41. *IBM Savings Plan v. Price*, *supra* n.7.

42. As described by the DOL, the "shared payment approach divides the pension benefits by splitting the actual benefit payments made with respect to a participant under the plan to give the alternate payee part of each payment." DOL, Employee Benefits Security Administration, "QDROs: The Division of Retirement Benefits through Qualified Domestic Relations Orders 29–30(2014).

43. A separate interest approach is one which "divides the participant's retirement benefit (other than just the payments)into two separate portions with the intent

of giving the alternate payee a separate right to receive a portion of the retirement benefit to be paid at a time and in a form different from that chosen by the participant. *Id*. at 30.

44. *Samaroo v. Samaroo*, 193 F. 3d 185, 189 (3rd Cir. 1999). There was a vigorous dissent in *Samaroo*, which was followed by the Court of Appeals for the TenthCircuit in *Patton v. Denver Post Corp*., *supra* n.16,.*Samaroo* was followed in *Sanzo v. NYSA-ILA Pension Trust Fund*, 2005 WL 3588470 (D.N.J. December 29, 2005) and *Garcia-Tatupu v Pete Rozelle NFL Player Retirement* Plan, *supra* n.16.

45. The plan was joined as a party to the divorce decree, but the New Jersey State Court held that the plan did not have standing to object to an alteration of the divorcedecree.Also, the attorney who drafted the initial divorce decree testified that the issue of survivor's benefits never came up when the divorce decree was being drafted, so in this case, the *nunc pro tunc* order did not correct a clerical error or reflect the original intent of the draftsperson.However, the state court that issued the *nunc pro tunc* order correctly stated that whether or not the state court order would result in any benefits being paid to the plaintiff was a question of federal law over which the federal courthad retained jurisdiction and which would be resolved by the federal court.

46. *Samaroo v. Samaroo*, *supra* n.43 at 190.

47. In *Marker v. Northrop Grumman*, 2006 WL 2873191 (N.D. Ill. October 4, 2006), in a decision holding that a plan could review a posthumous QDRO based solely upon the language of ERISA, the district court commented that, at least in the Seventh Circuit, in which courts are precluded from looking behind an order, it would make no difference, as it did in a case such as *Files*, whether there was an earlier order in effect.

48. In *Marva Jane Richardson Roy v. Johnson, et al* ., No. 15-1914 (3d Cir. August 2, 2016), in a case involving a posthumous QDRO but not a posthumous *nunc pro tunc* QDRO, the Third Circuit observed *in dicta* that once a participant, who had elected a joint and survivor annuity died, his then current spouse was entitled to a joint and survivor annuity. The Second Circuit might have reached a similar conclusion in this case, because no action was taken to cure any QDRO deficiencies within the statutory 18-month period.