



# IN A PUBLISHED CASE, COURT OF APPEALS APPROVES ENTRY OF QDRO 12 YEARS POST DATE OF DIVORCE—*JOUGHIN*, No. 329993 (7/11/2017)

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## Facts

- H and W were divorced on April 28, 2003.
- The Judgment of Divorce (JOD) awarded W (1) 50% of H's pension accrued as of April 30, 2002 and (2) \$23,823 from his profit-sharing plan account.
- The JOD provided that both parties "shall cooperate" in obtaining and processing the QDROs necessary to effectuate the transfers to W.
- For reasons not apparent on the record, the QDROs were not promptly filed. Instead, W submitted the QDROs for entry with the trial court on June 30, 2015- more than 12 years post-divorce.
- H objected claiming that W's submission of the QDROs for entry was an attempt to enforce the 2003 JOD and, hence, was time-barred under MCL 600.5809(3), which provides a 10-year statute of limitations applicable to attempts to enforce a noncontractual money obligation.
- W responded that because her claim did not arise until H reached retirement age, that the statute had not yet begun to run.
- Because H had not retired nor received any of his retirement benefits, the trial court entered the QDROs.
- H appealed.

## Court of Appeals Decision

- The Court disagreed with the parties' position that MCL 600.5809 applied to entry of a QDRO.
- Rather, the Court cited a previous decision that "when a judgment of divorce requires a QDRO to be entered, the QDRO is to be considered *as part of* the divorce judgment."
- Accordingly, the Court stated that "because the QDRO is *part of* the judgment, it necessarily cannot be viewed as *enforcing* the same judgment." \*\*\* "Instead, we hold that under these circumstances, the act to obtain entry of a proposed QDRO is a ministerial task done in conjunction with the divorce judgment itself."
- Thus, the Court concluded that entry of the QDROs was not time-barred
- Judge Kathleen Jansen wrote a vigorous dissent claiming, for various reasons, that entry of the QDRO after 10 years was barred by the statute of limitations.

## Comments on the Case

- Obviously, the case is a "poster child" for the importance of preparing and processing QDROs promptly – either contemporaneous with entry of the divorce judgment or soon thereafter.
- Based on many years' experience of preparing QDROs for legal aid clients under a pro bono program administered by the State Bar, QDROs unfiled for years following divorce are not uncommon. This case – a rare family law

published case – indicates that the passage of 10 years or more does not bar entry of a QDRO.

- However, in *Joughin*, the participant had not begun to receive benefits. Had he done so, or remarried, or died, the situation would likely have been much more problematic for the alternate payee.
- And, the *Joughin* judgment provision reprinted in the Court's opinion did not provide that W's share of H's profit-sharing plan account would be adjusted proportionately for gains or losses of plan investments. With the sharp advance of the stock market from 2003 through 2015, W paid a high price for not timely attending to the QDROs.
- In this regard, there is no precedent regarding whether the right to receive a proportional share of plan gains and losses passes automatically under state law with the trans-

fer via QDRO of an interest in an account balance plan such as a 401(k) or profit-sharing plan as in *Joughin*.

- Unless transferring a set dollar amount, it is highly advisable to include such a provision in both the JOD and the QDRO.

### About the Author

*Joe Cunningham has over 25 years of experience specializing in financial and tax aspects of divorce, including business valuation, valuing and dividing retirement benefits, and developing settlement proposals. He has lectured extensively for ICLE, the Family Law Section, and the MACPA. Joe is also the author of numerous journal articles and chapters in family law treatises. His office is in Troy, though his practice is statewide.*

