

## **Enforcement of Support Arrearage by QDRO – Re-Examining *Hoy*. *Nkopchieu v. Minlend*, 2011 Va. App. LEXIS 401.**

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### **Introduction**

*Hoy* sets a misleading precedent for the enforcement of support arrearage by Qualified Domestic Relations Order (“QDRO”). *See Hoy v. Hoy*, 510 S.E.2d 253 ( Va.App. 1999). Fortunately, the appellate court in *Minlend* has distinguished its holding in *Hoy*; and has permitted the entry of a QDRO to enforce a child support arrearage. It is a step in the right direction. A broader rule, however, is needed.

Rather than relying on the timing of the QDRO and public policy, the *Minlend* court should have based its holding on the continuing jurisdiction of Va. Code § 20-107.3(K)(4). Under the Virginia Code, it is the *intent* of the original or underlying order, decree, or judgment that controls, not the timing of a QDRO that permits the enforcement of a support arrearage.

### **I. Background**

The *Minlend* case involved the enforcement of a child support arrearage. The Employee Retirement Income Security Act (“ERISA”) expressly permits the use of a QDRO to enforce support obligations. A support-based QDRO is a powerful tool often overlooked. Moreover, many Virginia practitioners have been reluctant to seek enforcement of support obligations by QDRO as a result of *Hoy*. This casenote attempts to clarify when a support-based QDRO can be used to enforce a support arrearage, notwithstanding the court’s analysis in *Minlend*.

### **II. Statement of the Case**

**Holding:** The appellate court permitted the entry of a QDRO to enforce a child support arrearage in the amount of approximately \$28,000.00. The court distinguished its holding in *Hoy* which prohibited the entry of a QDRO, post-decree.

**Facts and Procedural History:** The parties were married on February 23, 2009; and separated on or about December 15, 2009. The parties had two (2) children. The mother requested *pendent lite* child support during the proceeding, which the trial court granted. The father failed to comply with the court order; and made no payments for support. The father also fled the United States sometime during the proceeding. Mother sought entry of a QDRO on January 13, 2011 to enforce the support award. The trial court denied the mother’s support-based QDRO, based upon the rationale of *Hoy*. The court granted the divorce on January 21, 2011. The appellate court reversed.

### III. Analysis

The court's holding is correct; but their analysis is incomplete. A broader rule is needed to clarify the misconceptions created by *Hoy*.

In *Minlend*, the court properly recognized that ERISA permits a support-based QDRO. The court also correctly employed a public policy argument regarding the duty of parents to support their children. See *Kelly v. Kelly*, 449 S.E.2d 55 (Va.App.Ct. 1994). The court, however, failed to rely on the continuing jurisdiction of the Va. Code. Specifically, that Va. Code § 20-107.3(K)(4) permits the entry of a QDRO to enforce a support arrearage. Instead, the court emphasized the timing of the QDRO, which the mother submitted to the trial court during the divorce case. In contrast to *Minlend*, the *Hoy* QDRO was submitted years after the divorce. Thus, the court distinguished its holding in *Hoy* based on the timing of each QDRO. The timing of the *Minlend* QDRO is important because it reflects *intent*. But timing is not dispositive of *intent*.

#### A. Support-Based QDROs under ERISA

ERISA expressly authorizes QDROs for the enforcement of support obligations.

*ERISA § 206(d)(3)(b)(i) (2011)*

B) For purposes of this paragraph--

(i) the term "qualified domestic relations order" means a domestic relations order--

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which--

(I) relates to the provision of *child support, alimony payments*, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law) (*emphasis added*).

#### B. Hoy Holding

Most jurisdictions have concluded that QDROs are simply enforcement mechanisms of a divorce decree. See *Self v. Self*, 907 So. 2d 546 (Fla. 2<sup>nd</sup> DCA 2005). Failure to recognize this premise is the fatal flaw of *Hoy*. To make matters worse, the former wife's divorce counsel plead his motion as a motion "to reinstate" the divorce case rather than a motion to enforce the underlying decree. Contrary to *Hoy*, enforcement of a divorce decree does not result in a modification of the decree, if the intent of the original order or decree is satisfied.

It is also important to note that the narrow holding in *Hoy* will only apply to orders or decrees entered *prior* to July 1, 1982. That is the effective date of Va. Code § 20-107.3(K)(4). In *Hoy*, the parties were divorced in 1973. Thus, the original decree in *Hoy* predated the effective

date of the Code. Therefore, the core rationale of *Hoy* will not apply to orders or decrees entered after July 1, 1982.

Since the decree predated the code, *Hoy* looked to Supreme Court Rule 1:1 to resolve the controversy. Under Supreme Court Rule 1:1, a *modification* of a final judgment, order, or decree is prohibited if more than twenty-one (21) days have lapsed.

*Va. Sup. Ct. R. 1:1* (2011)

#### Rule 1:1. Finality of Judgments, Orders and Decrees

All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be *modified*, vacated, or suspended for twenty-one days after the date of entry, and no longer. But notwithstanding the finality of the judgment, in a criminal case the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error and supersedeas; such postponement, however, shall not extend the time limits hereinafter prescribed for applying for a writ of error. The date of entry of any final judgment, order, or decree shall be the date it is signed by the judge either on paper or by electronic means in accord with Rule 1:17(*emphasis* added).

The term *modification* is critical when examining Rule 1:1. *Ballentine's* defines modification as a change, alteration, or amendment. In *Hoy*, the court concluded that a QDRO could not be entered since that would be an impermissible modification of the decree; and contrary to Rule 1:1. Once again, the court's premise is flawed. If the intent of the underlying order or decree is satisfied then entry of a support-based QDRO does not modify the judgment. Moreover, enforcement of a support arrearage does not provide an interest in the plan to a beneficiary. A QDRO, in that case, is merely enforcing the original or underlying judgment.

*Hoy* may also be challenged on federal preemption grounds. It is well settled that ERISA preempts state law. *Morales v. Trans World Airlines*, 504 U.S. 374 (1992); *see also Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); *see also Boggs v. Boggs*, 520 U.S. 833 (1997). In *Egelhoff*, the Supreme Court held that ERISA preempts a Washington State statute that automatically revokes, upon divorce, any transfer in assets to a former spouse. In *Boggs*, the Supreme Court held that ERISA preempts a Louisiana community property law involving testamentary transfer of an ERISA-based pension plan. *Boggs* also outlines the central purpose of ERISA to provide for "enhanced protection" to plan beneficiaries that includes former spouses and children.

#### C. Continuing Jurisdiction Authority of Va. Code § 20-107.3(K)(4)

Va. Code § 20-107.3(K)(4) trumps Virginia Supreme Court Rule 1:1 when the entry of a QDRO is required.

*Va. Code § 20-107.3(K)(4)* (2011)

The court shall have the continuing authority and jurisdiction to make any additional orders necessary to effectuate and enforce any order entered pursuant to this section, including the authority to:

Modify any order entered in a case filed on or after *July 1, 1982*, intended to affect or divide any pension, profit-sharing or deferred compensation plan or retirement benefits pursuant to the United States Internal Revenue Code or other applicable federal laws, only for the purpose of establishing or maintaining the order as a *qualified domestic relations order* or to revise or conform its terms so as to effectuate the expressed *intent* of the order (*emphasis* added).

“Intent of the order” as used in the Va. Code refers to the original or underlying order, decree, or judgment. In the context of divorce, it is the *intent* of parties’ decree of divorce that controls.

Ordinarily, pursuant to Rule 1:1, a trial court loses jurisdiction twenty-one days after entry of a decree; but when a QDRO is sought, courts have continuing jurisdiction under Va. Code § 20-107.3(K)(4) to enforce the intent of the underlying decree. *See Irwin v. Irwin*, 623 S.E.2d 438 (Va.App.Ct. 2005). If the QDRO is enforcing the intent of the decree to provide support, then there is no change of circumstances. *See Williams v. Williams*, 526 S.E. 2d 301 (Va.App.Ct. 2000).

As practical advice, it may be helpful for divorce counsel to include language in the decree that allows a subsequent order to be entered to enforce any provision of the decree including the collection of any support arrearage. That way, intent is clear.

## **Conclusion**

*Hoy* is misleading. Both ERISA and the Va. Code permit the use of a QDRO to enforce a support arrearage. Under Va. Code § 20-107.3(K)(4), it is the *intent* of the original or underlying order, decree, or judgment that controls, not the timing of a QDRO that permits the enforcement of a support arrearage.