

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. DANIEL J. SULLIVAN

Appellee

v.

JUDGE DONALD L. RAMSEY

Appellant

*

Case No. 09-1118

*

*

ON APPEAL FROM THE
LUCAS COUNTY COURT OF
APPEALS, SIXTH APPELLATE
DISTRICT

*

*

APPEAL OF RIGHT

*

Court of Appeals

*

Case No. L-09-1168

APPELLANT'S MERIT BRIEF

JULIA R. BATES
LUCAS COUNTY, OHIO
PROSECUTING ATTORNEY
By: John A. Borell (0016461)
Assistant Prosecuting
Attorney
Lucas County Courthouse
700 Adams Street
Suite 250
Toledo, Ohio 43624
Ph: 419-213-2001
Fax: 419-213-2011

COUNSEL FOR APPELLANT

Thomas A. Matuszak (0067770)
THOMAS A. MATUSZAK, LLC
405 Madison Ave., 20th Floor
Toledo, Ohio 43604
Telephone: (419) 724-0780
Fax: (419) 724-0782

COUNSEL FOR APPELLEE

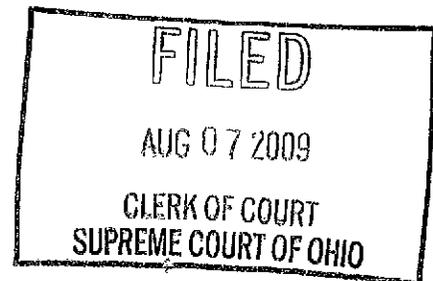


TABLE OF CONTENTS

TABLE OF AUTHORIES.....	i
I. STATEMENT OF THE CASE.....	1
II. STATEMENT OF FACTS.....	2
III. STANDARD FOR GRANTING A WRIT OF PROHIBITION.....	6
IV. POST-APPEAL JURISDICTION OF DOMESTIC RELATIONS COURT.....	9
V. ARGUMENT	
A. <u>Proposition of Law No. 1</u>	
The Domestic Relations Division of Common Pleas Court retains jurisdiction to amend a Qualified Domestic Relations order while an appeal is pending, since a QDRO is merely an order in aid of execution.....	10
B. <u>Proposition of Law No. 2</u>	
Appeal of a QDRO or an amended QDRO is an adequate remedy at law.....	13
VI. CONCLUSION.....	15
CERTIFICATE OF SERVICE.....	16
APPENDIX	<u>Appx. Page</u>
Notice of Appeal to the Ohio Supreme Court (June 18, 2009).....	i
Decision and Judgment of the Lucas County Court of Appeals (May 7, 2009).....	iv
Decision and Judgment of the Lucas County Court of Appeals (May 13, 2009).....	vi

Decision and Judgment of the Lucas
County Court of Appeals
(July 6, 2009).....viii

STATUTES; RULES:

26 U.S.C. §414.....xiv
6th Dist. Loc. App. R. 6.....xlii
Ohio Civil Procedure Rule 75.....xliii
Ohio Civil Procedure Rule 62.....xliv
R.C. 2509.09.....xlv
Ohio Appellate Rule 3.....xlvi

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>ANS Connect v. Hon. William J. Coyne, et al.</i> , Cuyahoga App. No. 88602, 2006 Ohio 6599	7
<i>Brian Condron v. The City of Willoughby</i> , Lake App. No. 2007-L-015, 2007 Ohio 5208	14
<i>Carolyn Peters v. James Peters</i> (Feb. 23, 2001), Montgomery App. No. 18445, unreported, 2001 Ohio App. LEXIS 672 *8	13
<i>DiFrangia v. DiFrangia</i> , Trumbull App. No. 2003-T-0004, 2003 Ohio 6090	4, 13
<i>Glenna Oliver-Pavkovich v. Dwight L. Pavkovich</i> , Mahoning App. No. 02 CA 223, 2003 Ohio 6718	11
<i>Gordon v. Gordon</i> (2001), 144 Ohio App.3d 21, 24, 759 N.E.2d 431	4
<i>Hines v. Hines</i> , Tuscarawas App. No. 2004-AP-020009, 2004 Ohio 4666	12
<i>Hoyt v. Hoyt</i> (1990), 53 Ohio St.3d 177, 180, 559 N.E.2d 1292; 26 U.S.C. §414(p)	4
<i>Jacquiline Kingery v. Jerome Kingery</i> , Logan App. No. 8-05-02, 2005 Ohio 3608	11, 12
<i>Janet M. Sullivan v. Daniel J. Sullivan</i> , Case No. DR-1996-0989	1, 5
<i>Labate v. Chrysler, Jeep, Dodge, Inc., et al.</i> , Columbiana App. No. 05 CO 57, 2006 Ohio 3480	10
<i>Lawrence Tuckosh v. Carol Cummings</i> , Belmont App. No. 07 HA 9, 2008 Ohio 5819	9
<i>Mary Jane Grubic v. Pete Grubic</i> , Cuyahoga App. No. 82462, 2003 Ohio 3680	9
<i>McKinney v. McKinney</i> (2001), 142 Ohio App.3d 604, 608, 756 N.E.2d 694	11, 13

Naoma K. Matthews v. Benjamin H. Matthews, et al. (Jan. 25, 1989),
Summit App. No. 13528, unreported, 1989 Ohio App. LEXIS 304 *4
. 11

Paul F. Bok v. Mancy A. Bauer; Defiance App. No. 4-01-30, 2002
Ohio 1295 9

Paul M. Lane, et al. v. Court of Common Pleas of Ross (Dec. 20,
1984), Ross App. No. 1130, unreported, 1984 Ohio App. LEXIS 12045
*4 11

Paulette Joyce Howard v. Marshall Howard (Sept. 19, 1989),
Montgomery App. 11479, unreported, 1989 Ohio App. LEXIS 3643 *5;
R.C. 2505.09 10

Ronald L. Bagley v. Ellen Bagley, ___ Ohio App.3d ___, 2009 Ohio
688, 908 N.E.2d 469 8, 13

Schrader v. Schrader (1995), 108 Ohio App.3d 25, 28, 669 N.E.2d
878 4

Sherri Lee Lamb v. Michael W. Lamb (Dec. 4, 1998), Paulding App.
No. 11-98-09, unreported, 1998 Ohio App. Lexis 6007 *5. . . 13

State ex rel. Brady v. Pianka, 106 Ohio St.3d 147, 2005 Ohio
4105, 832 N.E.2d 1202 9

State ex rel. Carody, et al. v. Justice, Judge (1926), 114 Ohio
St. 94, 150 N.E. 430. 8

State ex rel. Florence v. Zitter, 106 Ohio St.3d 87, 2005 Ohio
3804, 831 N.E.2d 1003 8, 14

State ex rel. Klein v. Chorpening (1983), 6 Ohio St.3d 3, 4, 450
N.E.2d 1161 10

State ex rel. Nalls v. Russo, 96 Ohio St.3d 410, 2002 Ohio 4907,
775 N.E.2d 522 9

State ex rel. Neguse v. Hon. Judge Crawford, Franklin App. No.
06AP-389, 2007 Ohio 1168 15

State ex rel. State Fire Marshall v. Curl, Judge, 87 Ohio St.3d
568, 570, 2000 Ohio 248, 722 N.E.2d 73 10

State ex rel. The Ohio Company, et al. v. Maschari, Judge (1990),
51 Ohio St.3d 18, 20-1, 553 N.E.2d 1356 8

<i>State ex rel. United States Steel Corp. v. Zaleski</i> , 98 Ohio St.3d 395, 2003 Ohio 1630, 786 N.E.2d 39	9
<i>State ex rel. Utility Workers Union of America v. MacElwane, Judge</i> (1961), 116 Ohio App. 183, 191, 187 N.E.2d 901	7
<i>State of Ohio ex rel. Bruce Andrew Brown v. Lyndhurst Municipal Court, et al.</i> , Cuyahoga App. No. 90779, 2008 Ohio 607	10
<i>State of Ohio v. Moncrease</i> (Apr. 13, 2000), unreported, 2000 Ohio App. LEXIS 1650 *7.	14
<i>Wilson v. Wilson</i> , 116 Ohio St.3d 68, 2007 Ohio 6056, 878 N.E.2d 16	4, 12, 13
<i>Yee v. Erie County Sheriff's Department</i> (1990), 51 Ohio St.3d 43, 553 N.E.2d 1354.	10

MISCELLANEOUS

PAGE

Appellate Rule 3(F)	14, 15
Civ.R. 62(B)	10
Civ.R. 75(J)	10
Employee Retirement Income Security Act of 1974(ERISA)	3, 4
R.C. 2505.09	10
R.C. 3105.171(A)(3)(c)	11
S.Ct.Prac.R. II, Sect. 1(A)(1)	2, 7

I. STATEMENT OF THE CASE

On April 28, 2009, Appellee Daniel J. Sullivan filed in the Sixth District Court of Appeals a Verified Complaint for Alternative and Permanent Writs of Prohibition. (Supp. 0.) The Complaint named as Respondent, Appellant Judge Donald L. Ramsey, a visiting judge serving in the Lucas County Court of Common Pleas, Domestic Relations Division. (Supp. 1.) Appellant has, since July, 2006, presided over a case entitled: *Janet M. Sullivan v. Daniel J. Sullivan*, Case No. DR-1996-0989. (Supp. 1-2, and 4.)

The Appellee's Complaint alleged that the Appellant Judge was without jurisdiction to issue an Amended Qualified Domestic Relations Order (QDRO), since the Appellee had filed a Notice of Appeal from a January 9, 2009 Judgment Entry and Qualified Domestic Relations Order (QDRO) issued by the Appellant. (Supp. 3-4.) The Complaint also alleged that the Amended QDRO interferes and is inconsistent with the Court of Appeals' ability to affirm, modify, or reverse the January 9, 2009 Judgment Entry and QDRO. (Supp. 5.) The Complaint requested that the Court of Appeals issue an alternative writ vacating the Amended QDRO issued by the Appellant on April 7, 2009 and a permanent writ of prohibition. (Supp. 6.)

On May 7, 2009, the Sixth District Court of Appeals, without giving the Appellant an opportunity to respond, issued a peremptory writ of prohibition vacating the April 7, 2009 Amended QDRO and ordering the Appellant from taking any action inconsistent with the

Court of Appeals' ability to affirm, modify or reverse the January 9, 2009 judgment entry. (Appx. v.)

On June 18, 2009, the Appellant filed a timely Notice of Appeal with this Court, pursuant to S.Ct.Prac.R. II, Sect. 1(A) (1). (Appx. i.) The Appellant now files his merit brief herein. The merit brief establishes that the Appellant had jurisdiction to issue the Amended QDRO and the Appellee had an adequate remedy at law.

Therefore, this Court must reverse the Court of Appeals' May 7, 2009 Decision and Judgment Entry issuing a peremptory writ of prohibition.

II. STATEMENT OF THE FACTS

Appellee and Janet Sullivan were divorced on July 30, 1997. (Appx. viii.) The divorce decree awarded Janet "25% of the accrued monthly benefit that the [Appellee] was entitled to receive as of May 14, 1997" from the Appellee's retirement plan with the United States Civil Service Retirement System("CSRS"). (Supp. 1 and 8; Appx. viii-ix.) For reasons that are not clear, the parties failed to perfect a QDRO or a separate judgment in a timely fashion so as to carry out the provisions of the divorce decree. (Supp. 24.)

In 1999, without notifying Janet, Appellee moved his pension plan and funds from the CSRS system to the District of Columbia Police Officers' and Firefighters' Retirement Plan ("P&FRP"). (Supp. 24; Appx. ix.) On October 18, 2003, also without notice to Janet, the Appellee began receiving all pension benefits without

any diminution or allocation of Janet's share to her. (Supp. 24)
The Appellee's actions in both transferring the parties' accumulations in the Civil Service Retirement System and in taking all of the retirement benefits was in derogation of Janet's rights in and to the pension plan. (Supp. 24)

On July 27, 2006, Janet filed a post-divorce motion asking the court to (1) approve a QDRO directing the plan administrator of the P&FRP to pay Janet \$1,325.07 per month, (2) award Janet a lump sum for benefits she alleged were due her but not received from 2003 to the time the motion was filed, and attorney fees. (Supp. 2; Appx. ix.) The motion was assigned to the Appellant who serves as a visiting judge in the Lucas County Common Pleas Court, Domestic Relations Division. (Supp. 2)

After extensive litigation on the motion, the Appellant issued an order, on January 9, 2009, awarding Janet \$1,325 per month from P&FRP beginning on January 1, 2009, \$76,185.92 in retroactive retirement benefits, and \$24,684 in attorney fees. (Supp. 24; Appx. ix.) The Appellant ordered Janet to prepare a QDRO "as may be required by the pension administrator, so as to perfect Plaintiff's rights in said pension." (Appx. ix.)

The QDRO was prepared and signed by the Appellant on January 9, 2009. (Supp. 33; Appx. ix.) The QDRO stated that, if any Order submitted to the Plan Administrator¹ is held not to be a Qualified

¹ A QDRO must comply with the requirements of the Employee Retirement Income Security Act of 1974 (ERISA). *Wilson v. Wilson*, 116 Ohio St.3d

(continued...)

Domestic Relations Order, the parties shall submit to the Trial Court a request to amend or modify the Order to make it compliant and said amendment or modification Order was to be entered Nunc Pro Tunc if appropriate and jurisdiction is reserved for this purpose.² (Supp. 32; Appx. ix.)

On January 20, 2009, the Appellee filed a timely Notice of Appeal from the Appellant's January 9, 2009 judgment entry and QDRO. (Supp. 3 and 34; Appx. x.) This appeal was assigned case number L-09-1022. (Appx. x.)

On April 7, 2009, the Appellant entered an Amended Qualified Domestic Relations Order. (Supp. 3 and 51; Appx. x.) The Amended QDRO was necessary to comply with the requirements of P & FRP's Plan Administrator. (Appx. x.)

The Amended QDRO made no substantive changes in the terms and conditions of the QDRO. (Supp. 28 and 51.) The changes were only

(...continued)

268, 2007 Ohio 6056, 878 N.E.2d 16, at ¶ 6. ERISA requires that the pension plan administrator review the QDRO and determine whether it constitutes a proper QDRO under the Act. *Hoyt v. Hoyt*(1990), 53 Ohio St.3d 177, 180, 559 N.E.2d 1292; 26 U.S.C. §414(p).

² If the trial court enters a QDRO, it can modify the Order if it expressly reserves the power to do so. *Gordon v. Gordon*(2001), 144 Ohio App.3d 21, 24, 759 N.E.2d 431; *Schrader v. Schrader*(1995), 108 Ohio App.3d 25, 28, 669 N.E.2d 878; cf. *DiFrangia v. DiFrangia*, Trumbull App. No. 2003-T-0004, 2003 Ohio 6090, at ¶ 24. (reservation of jurisdiction is not necessary to modify QDRO, since a QDRO is merely an order in aid of execution on the property division ordered in the divorce decree)

format and wording modifications to comply with the requirements of P & FRP's Plan Administrator. (Supp. 28, 51; Appx. x.)

Appellee filed a timely notice of appeal from this Amended QDRO. (Appx. x.) The second appeal was assigned case number. L-09-1123. (Appx. x.)

On April 28, 2009, Appellee Daniel J. Sullivan filed in the Sixth District Court of Appeals a Verified Complaint for Alternative and Permanent Writs of Prohibition. (Supp. 0.) The Complaint named as Respondent, Appellant Judge Donald L. Ramsey, a visiting judge serving in the Lucas County Court of Common Pleas, Domestic Relations Division. (Supp. 1.) Appellant has, since July, 2006, presided over a case entitled: *Janet M. Sullivan v. Daniel J. Sullivan*, Case No. DR-1996-0989. (Supp. 1-2 and 4.)

The Appellee's Complaint alleged that the Appellant Judge was without jurisdiction to issue an Amended Qualified Domestic Relations Order (QDRO), since the Appellee had filed a Notice of Appeal from a January 9, 2009 Judgment Entry and Qualified Domestic Relations Order (QDRO) issued by the Appellant. (Supp. 3-4.) The Complaint also alleged that the Amended QDRO interfered and is inconsistent with the Court of Appeals' ability to affirm, modify, or reverse the January 9, 2009 Judgment Entry and QDRO. (Supp. 5.) The Complaint requested that the Court of Appeals issue an alternative writ vacating the Amended QDRO issued by the Appellant on April 7, 2009 and a permanent writ of prohibition. (Supp. 6.)

On May 7, 2009, the Sixth District Court of Appeals, without

giving the Appellant an opportunity to respond³, issued a peremptory writ of prohibition vacating the April 7, 2009 Amended QDRO and ordering the Appellant from taking any action inconsistent with the Court of Appeals' ability to affirm, modify or reverse the January 9, 2009 judgment entry. (Appx. v.)

On May 13, 2009, the Sixth District Court of Appeals sua sponte dismissed Appellee's second appeal (Case No. L-09-1123) which challenged the vacated Amended QDRO. (Appx. vi, x.) The dismissal was based solely on the issuance of the peremptory writ that vacated the Amended QDRO.⁴ (Appx. vi.)

On June 18, 2009, the Appellant filed a timely Notice of Appeal with the Court, pursuant to *S.Ct.Prac.R.* II, Sect. 1(A) (1), from the Court of Appeals' May 7, 2009 Decision and Judgment Entry issuing a peremptory writ of prohibition. (Appx. i.)

The Appellant now files his merit brief herein. The merit brief establishes that the Appellant had jurisdiction to issue the Amended QDRO and the Relator had an adequate remedy at law.

Therefore, this Court must reverse the Court of Appeals' May 7, 2009 Decision and Judgment Entry issuing a peremptory writ of prohibition.

III. STANDARD FOR GRANTING A WRIT OF PROHIBITION

A writ of prohibition is the most difficult of any of the

³ The Court's Local Rules do not require the Respondent in an Original Action to file a response to the complaint unless directed to do so by the Court. *6th Dist. Loc.App.R.* 6.

⁴ A motion to reconsider the dismissal was denied. (Appx. xiii.)

extraordinary remedies to obtain. *State ex rel. Utility Workers Union of America v. MacElwane, Judge* (1961), 116 Ohio App. 183, 191, 187 N.E.2d 901, 906. A writ of prohibition is issued only in cases of extreme necessity. *Id.* The writ should be used with great caution and should not issue in doubtful or borderline cases. *ANS Connect v. Hon. William J. Coyne, et al.*, Cuyahoga App. No. 88602, 2006 Ohio 6599, at ¶ 6; *State ex rel. Utility Workers Union of America, supra.*

The question presented in every instance where the issuance of a writ of prohibition is requested is whether it clearly appears that the court whose action is sought to be prohibited has no jurisdiction over the cause which it is attempting to adjudicate, or is about to exceed its jurisdiction. *State ex rel. The Ohio Company, et al. v. Maschari, Judge*(1990), 51 Ohio St.3d 18, 20-1, 553 N.E.2d 1356, 1359.

The principles governing prohibition are well established. *ANS Connect, supra.* In order to be entitled to the requested writ of prohibition, a relator must establish that (1) Respondent was about to exercise judicial power, (2) the exercise of that power was not authorized by law, and (3) denial of the writ would have caused injury for which no other adequate remedy in the ordinary course of law existed. *State ex rel. Florence v. Zitter*, 106 Ohio St.3d 87, 2005 Ohio 3804, 831 N.E.2d 1003, at ¶14.

Where a court has general subject-matter jurisdiction over a

cause of action, a writ of prohibition will not be awarded to prevent an anticipated erroneous judgment, since an adequate remedy is available through an appeal. *State ex rel. Carody, et al. v. Justice, Judge* (1926), 114 Ohio St. 94, 150 N.E. 430. The domestic relations division of court of common pleas has full equitable powers and jurisdiction appropriate to the determination of all domestic relations matters. *Ronald L. Bagley v. Ellen Bagley*, ___ Ohio App.3d ___, 2009 Ohio 688, 908 N.E.2d 469, at ¶ 37.

Thus, in the absence of a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction, such as the domestic relations division of common pleas court, can determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy by appeal. *State ex rel. Nalls v. Russo*, 96 Ohio St.3d 410, 2002 Ohio 4907, 775 N.E.2d 522, at ¶ 18; *State ex rel. United States Steel Corp. v. Zaleski*, 98 Ohio St.3d 395, 2003 Ohio 1630, 786 N.E.2d 39, at ¶ 8.

Therefore, if the lack of jurisdiction is not patent and unambiguous, there is generally no entitlement to a writ of prohibition to prevent a trial court's exercise of jurisdiction. *State ex rel. Brady v. Pianka*, 106 Ohio St.3d 147, 2005 Ohio 4105, 832 N.E.2d 1202, at ¶¶ 9-10.⁵

⁵ Courts must be careful not to jurisdictionalize alleged error. *Bagley*, supra at ¶ 35 (Fain, J. concurring). The problem with jurisdictionalizing alleged errors of a trial court is the resulting undermining of the efficacy and finality of judicial judgments and orders. *Id.*, at ¶ 42. Even a century after an erroneous judgment or order has been pronounced, which all of the parties decided to live

(continued...)

IV. POST-APPEAL JURISDICTION OF DOMESTIC RELATIONS COURT

Domestic Relations Courts have continuing jurisdiction to modify its orders, including Qualified Domestic Relations Orders when the court expressly reserves jurisdiction. *Lawrence Tuckosh v. Carol Cummings*, Belmont App. No. 07 HA 9, 2008 Ohio 5819, ¶ 24; *Mary Jane Grubic v. Pete Grubic*, Cuyahoga App. No. 82462, 2003 Ohio 3680, ¶ 2; *Paul F. Bok v. Mancy A. Bauer*; Defiance App. No. 4-01-30, 2002 Ohio 1295; Civ.R. 75(J).⁶

However, as a general rule, a trial court loses jurisdiction after an appeal is filed, except to take action in aid of the appeal. *Yee v. Erie County Sheriff's Department* (1990), 51 Ohio St.3d 43, 553 N.E.2d 1354. There is an exception to this general rule. *Labate v. Chrysler, Jeep, Dodge, Inc., et al.*, Columbiana App. No. 05 CO 57, 2006 Ohio 3480, at ¶ 12. The trial court, after an appeal is perfected, does retain all jurisdiction not inconsistent with that of the appellate court to review, affirm, modify, or reverse the order from which the appeal is taken. *State ex rel. State Fire Marshall v. Curl, Judge*, 87 Ohio St.3d 568, 570, 2000 Ohio 248, 722 N.E.2d 73; *Yee, supra*.

An appeal does not operate as a stay of execution of a

(...continued)

with at the time, anyone who can demonstrate that he or she is adversely impacted by the ancient judgment or order may collaterally attack it, since that person is merely asking the court to recognize that a judgment or order long ago entered is, in fact void. *Id.*

⁶ See footnote No. 2

judgment that has been appealed. *Paulette Joyce Howard v. Marshall Howard* (Sept. 19, 1989), Montgomery App. 11479, unreported, 1989 Ohio App. LEXIS 3643 *5; R.C. 2505.09; Civ.R. 62(B). Therefore, the trial court also retains jurisdiction to enforce its judgment from which the appeal has been taken during the pendency of that appeal, as well as proceedings in aid, until such time as execution of the judgment is stayed and a supersedeas bond is posted. *State ex rel. Klein v. Chorpening*(1983), 6 Ohio St.3d 3, 4, 450 N.E.2d 1161; *State of Ohio ex rel. Bruce Andrew Brown v. Lyndhurst Municipal Court, et al.*, Cuyahoga App. No. 90779, 2008 Ohio 607, at ¶ 4; *Naoma K. Matthews v. Benjamin H. Matthews, et al.*(Jan. 25, 1989), Summit App. No. 13528, unreported, 1989 Ohio App. LEXIS 304 *4; *Paul M. Lane, et al. v. Court of Common Pleas of Ross*(Dec. 20, 1984), Ross App. No. 1130, unreported, 1984 Ohio App. LEXIS 12045 *4.

V. ARGUMENT

A. Proposition of Law No. 1

The Domestic Relations Division of Common Pleas Court retains jurisdiction to amend a Qualified Domestic Relations order while an appeal is pending, since a QDRO is merely an order in aid of execution

The Court of Appeals' May 7, 2009 Decision and Judgment Entry granted a peremptory writ of prohibition relating to an Amended QDRO issued by the Appellant. (Appx. v.)

A retirement benefit that a spouse acquired during the marriage is a marital asset that must be divided equitably in a

divorce decree terminating the marriage. *McKinney v. McKinney*(2001), 142 Ohio App.3d 604, 608, 756 N.E.2d 694; R.C. 3105.171(A)(3)(c). A domestic relations court exercises its authority to effectuate a divorce decree by issuing a court order; retirement benefits are usually effectuated by way of a Qualified Domestic Relations Order (QDRO). *Jacquiline Kingery v. Jerome Kingery*, Logan App. No. 8-05-02, 2005 Ohio 3608, at ¶ 10; *Glenna Oliver-Pavkovich v. Dwight L. Pavkovich*, Mahoning App. No. 02 CA 223, 2003 Ohio 6718, at ¶ 18.

A QDRO is a current distribution of the rights in retirement account that is payable in the future, when the payee retires. *Kingery*, supra. However, it is the divorce decree that determines the rights of the parties, including establishing the parties' property distribution and providing for an equitable pension division. *Wilson v. Wilson*, 116 Ohio St.3d 68, 2007 Ohio 6056, 878 N.E.2d 16, at ¶ 18.

A QDRO is ordinary issued subsequent to and separate from the divorce decree itself, after the employer has approved its term as conforming to the particular pension plan involved. *Pavkovich*, supra. Therefore, it is the divorce decree that is the final order, regardless of whether it calls for a QDRO, since the QDRO merely implements the terms and provisions of the divorce decree. *Wilson*, at ¶ 15.

A QDRO does not in any way constitute a further adjudication

on the merits of the pension division, as its sole purpose is to implement the terms of the divorce decree. *Id.*, at ¶ 16. Thus, because a QDRO is merely a court order that effectuates the allocation of rights determined in the divorce decree, the QDRO itself does not represent an adjudication of any issues of law or fact. *Kingery*, at ¶ 10. Accordingly, a QDRO is not an independent judgment entry of the court, but rather an enforcement mechanism. *Kingery*, *supra.*; *Hines v. Hines*, Tuscarawas App. No. 2004-AP-020009, 2004 Ohio 4666, at ¶ 19.

It is a ministerial tool used by the court in order to aid the relief that the court had previously granted. *Wilson*, at ¶ 15; *Sherri Lee Lamb v. Michael W. Lamb*(Dec. 4, 1998), Paulding App. No. 11-98-09, unreported, 1998 Ohio App. *Lexis* 6007 *5. It is, therefore, *merely an order in aid of execution* on the property division ordered in the final decree of divorce. *Ronald L. Bagley v. Ellen Bagley*, Greene App. No.08-CA-57, 2009 Ohio 688, at ¶ 26; *McKinney*, *supra.*; *Patricia DiFrangia v. Roger DiFrangia*, *supra.*; *Carolyn Peters v. James Peters*(Feb. 23, 2001), Montgomery App. No. 18445, unreported, 2001 Ohio App. *LEXIS* 672 *8. As a proceedings in aid of execution, the Respondent retained jurisdiction to enforce the QDRO from which the appeals had been taken during the pendency of the appeal, until such time as execution of the judgment was stayed and a supersedeas bond was posted.

In the present case, the QDRO, as required by ERISA, was

submitted to the Plan Administrator of P & FRP. The Amended QDRO was necessary to comply with the requirements of P & FRP's Plan Administrator. (Appx. x.) The Amended QDRO made no substantive changes in the terms and conditions of the QDRO. (Supp. 28 and 51.) The changes were only format and wording modifications to comply with the requirements of P & FRP's Plan Administrator. (Supp. 28, 51; Appx. x.)

Thus, the Amended QDRO was necessary to enforce the pension rights created by the divorce decree and the Appellant retained jurisdiction to do so during the appeal, since the Amended QDRO was merely an order in aid of execution and no stay had been issued.

Therefore, this Court must reverse the Court of Appeals' May 7, 2009 Decision and Judgment Entry issuing a peremptory writ of prohibition.

B. Proposition of Law No. 2

Appeal of a QDRO or an amended QDRO is an adequate remedy at law

In order to be entitled to the requested writ of prohibition, a relator must establish that he had no other adequate remedy in the ordinary course of law existed. *State ex rel. Florence v. Zitter, supra.*

The Appellee herein had an adequate remedy at law by amending the notice of appeal filed from the Appellant's January 9, 2009 judgment and QDRO-case number L-09-1022 or an appeal from the Amended QDRO.

Appellate Rule 3(F) provides that the court of appeals may allow an amendment of a timely filed notice of appeal, within its discretion and upon such terms as are just. *State of Ohio v. Moncrease* (Apr. 13, 2000), unreported, 2000 Ohio App. LEXIS 1650 *7. This rule can be utilized to seek leave to file an amended notice of appeal to include an order entered after the original notice of appeal was filed. *Brian Condron v. The City of Willoughby*, Lake App. No. 2007-L-015, 2007 Ohio 5208, at ¶ 28.

In the present case, on January 20, 2009, the Appellee filed a timely Notice of Appeal from the Appellant's January 9, 2009 judgment and QDRO. (Supp. 3 and 34; Appx. x.) This appeal was assigned case number L-09-1022. (Appx. x.) On April 7, 2009, the Appellant entered an Amended Qualified Domestic Relations Order. (Supp. 3 and 51; Appx. x.)

In accordance with Appellate Rule 3(F), the Appellee could have sought leave to file an amended notice of appeal to include an appeal from the Amended QDRO.⁷

In addition, the Lucas County Domestic Relations Court had general subject-matter jurisdiction over the issues presented in Appellee's underlying domestic relations case. Thus, the Appellant was authorized to determine his own jurisdiction. Therefore, there

⁷ Appellee's failure to timely avail himself of this legal remedy does not make the remedy inadequate and confer a right to a writ of prohibition. *State ex rel. Neguse v. Hon. Judge Crawford*, Franklin App. No. 06AP-389, 2007 Ohio 1168, at ¶ 17.

was an absence of a patent and unambiguous lack of jurisdiction and the Appellee had an adequate remedy by appeal.

Interestingly, the Appellee **actually** filed a notice of appeal from the Amended QDRO. (Appx. x.) This appeal was assigned case number L-09-1123. (Appx. x.) The Sixth District Court of Appeals sua sponte dismissed Appellee's second appeal. (Appx. vi, x.) The dismissal was based solely on the issuance of the peremptory writ that vacated the Amended QDRO. (Appx. vi.) There was no reason, under Ohio law, prohibiting the Court of Appeals from determining the validity of the Amended QDRO in the direct appeal.

Therefore, the Appellee had an adequate remedy at law and this Court must reverse the Court of Appeals' May 7, 2009 Decision and Judgment Entry issuing a peremptory writ of prohibition.

VI. CONCLUSION

Therefore, since the Amended QDRO was merely an order in aid of execution, no stay had been issued, and the Relator had an adequate remedy at law, this Court must reverse the Court of Appeals' May 7, 2009 Decision and Judgment Entry issuing a peremptory writ of prohibition.

Respectfully submitted,

JULIA R. BATES
LUCAS COUNTY PROSECUTING ATTORNEY

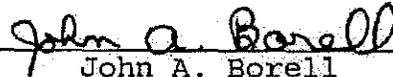
By: John A. Borell
John A. Borell
Assistant Prosecuting Attorney
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief was sent by Ordinary U.S.
mail to the following counsel on the _____ day August, 2009:

Thomas A. Matuszak
THOMAS A. MATUSZAK, LLC
405 Madison Ave., 20th Floor
Toledo, Ohio 43604
Telephone: (419) 724-0780
Fax: (419) 724-0782

COUNSEL FOR APPELLEE



John A. Borell
Assistant Prosecuting Attorney
Counsel for Appellant

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. DANIEL J. SULLIVAN

Appellee

v.

JUDGE DONALD L. RAMSEY

Appellant

Case No. 09-1118

ON APPEAL FROM THE
LUCAS COUNTY COURT OF
APPEALS, SIXTH APPELLATE
DISTRICT

APPEAL OF RIGHT

Court of Appeals
Case No. L-09-1168

NOTICE OF APPEAL

JULIA R. HATES
LUCAS COUNTY, OHIO
PROSECUTING ATTORNEY
By: John A. Borell(0016461)
Assistant Prosecuting
Attorney
Lucas County Courthouse
700 Adams Street
Suite 250
Toledo, Ohio 43624
Ph: 419-213-2001
Fax: 419-213-2011

COUNSEL FOR APPELLANT

Thomas A. Matuszak(0067770)
THOMAS A. MATUSZAK, LLC
405 Madison Ave., 20th Floor
Toledo, Ohio 43604
Telephone: (419) 724-0780
Fax: (419) 724-0782

COUNSEL FOR APPELLEE

RECEIVED

JUN 16 2009

CLERK OF COURT
SUPREME COURT OF OHIO

FILED

JUN 18 2009

CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellant Judge Donald L. Ramsey

Appellant Judge Donald L. Ramsey hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lucas County Court of Appeals, Sixth Appellate District, entered in Court of Appeals case No. L-09-1118 on May 7, 2009.

This case originated in the Court of Appeals and is therefore, an appeal of right pursuant to S.Ct.Prac.R. II, Sect. 1(A) (1).

Respectfully submitted,

JULIA R. BATES
LUCAS COUNTY PROSECUTING ATTORNEY

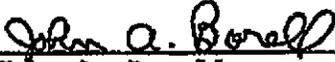
By: John A. Borell
John A. Borell
Assistant Prosecuting Attorney
Counsel for Appellant

CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing Notice of Appeal was sent by ordinary U.S. mail this 17th day of June, 2009 to:

Thomas A. Matuszak(0067770)
THOMAS A. MATUSZAK, LLC
405 Madison Ave., 20th Floor
Toledo, Ohio 43604
Telephone: (419) 724-0780
Fax: (419) 724-0782

COUNSEL FOR APPELLEE



John A. Borell
Assistant Prosecuting Attorney

FILED
COURT OF APPEALS
2009 MAY -7 P 1:09

COMMON PLEAS COURT
CLERK OF COURTS
IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State ex rel. Daniel J. Sullivan

Court of Appeals No. L-09-1118

Relator

v.

Judge Donald L. Ramsey

DECISION AND JUDGMENT

Respondent

Decided:

MAY 07 2009

This matter is before the court as an original action in prohibition. Relator, Daniel J. Sullivan, seeks an order from this court prohibiting respondent, Judge Donald L. Ramsey of the Lucas County Court of Common Pleas, Domestic Relations Division, from continuing to exercise jurisdiction in the underlying case of *Janet M. Sullivan v. Daniel J. Sullivan*, Lucas County Domestic Relations Court (case No. DR-1996-0989). Relator also seeks an order from this court vacating the "Amended Qualified Domestic Relations Order" journalized in the underlying case on April 7, 2009 by respondent.

Relator filed a timely notice of appeal in this court on January 20, 2009 from the January 9, 2009 judgment entry and the Qualified Domestic Relations Order in the underlying case. Once relator's notice of appeal was filed (case No. L-09-1022), the trial

E-JOURNALIZED

MAY - 7 2009

FAXED

court was divested of jurisdiction in its case no. DR-1996-0989. *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97.

On consideration whereof, this court issues a peremptory writ of prohibition and orders that respondent refrain from taking any action inconsistent with this court's ability to affirm, modify or reverse respondent's January 9, 2009 judgment entry in case no. DR-1996-0989. Further, the trial court's April 7, 2009 "Amended Qualified Domestic Relations Order" in case no. DR-1996-0989 is vacated.

A copy of this peremptory writ shall be served upon respondent personally, by the Lucas County clerk or deputy clerk, who is hereby specially authorized to serve this writ. The clerk or deputy clerk shall verify, by affidavit, the time, place and manner of service and file such verification upon completion of the service.

The clerk is further directed to immediately serve upon all other parties a copy of this peremptory writ in a manner prescribed by Civ.R. 5(B).

It is so ordered.

Mark L. Pietrykowski, J.

Arlene Singer, J.

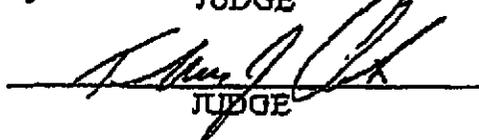
Thomas J. Osowik, J.
CONCUR.



JUDGE



JUDGE



JUDGE

FAXED

FILED
COURT OF APPEALS

2009 MAY 13 P 12:06

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Janet M. Sullivan

Court of Appeals No. L-09-1123

Appellee

Trial Court No. DR96-0989

v.

Daniel J. Sullivan

DECISION AND JUDGMENT

Appellant

Decided: MAY 13 2009

This case is before the court sua sponte. Appellant, Daniel J. Sullivan, has filed an appeal from an April 7, 2009 order of the trial court judge which amended a previously entered qualified domestic relations order. On April 28, 2009, Daniel Sullivan filed an original action asking this court to vacate the April 7 order since the judge entered it while the original qualified domestic relations order was pending on appeal. On May 7, 2009, this court issued a peremptory writ vacating the April 7 amended order.

E-JOURNALIZED

MAY 13 2009

FAXED

1.

No appeal can be taken from a void or vacated judgment. *Gordon v. Gordon*, 5th Dist. Nos. CT2007-0072, CT2007-0081, 2009-Ohio-177, ¶ 30 – 31.

Accordingly, this appeal is dismissed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

Arlene Singer, J.

Thomas J. Osowik, J.
CONCUR.


JUDGE

JUDGE

JUDGE

FAXED

FILED
COURT OF APPEALS
2009 JUL -6 A 10: 26
COMMON PLEAS COURT
BERNIE QUILLER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Janet M. Sullivan
Appellee

Court of Appeals No. L-09-1123
Trial Court No. DR96-0989

v.

Daniel J. Sullivan
Appellant

DECISION AND JUDGMENT
Decided: JUL 06 2009

This post-divorce appeal concerns issues surrounding a Qualified Domestic Relations Order ("QDRO") entered in the Lucas County Court of Common Pleas, Domestic Relations Division, 11 years after appellant, Daniel Sullivan and appellee, Janet Sullivan's divorce was final. There are motions from both parties presently before this court.

A history of the proceedings in this case will set the stage for our consideration of the motions. The parties were divorced on July 30, 1997, and Janet was awarded "25% of the accrued monthly benefit that the Defendant, Daniel J. Sullivan, was entitled to

FAXED E-JOURNALIZED

1. JUL - 6 2009

receive as of May 14, 1997" from Daniel's retirement plan with the United States Civil Service Retirement System ("CSRS"). In 1999, Daniel moved his pension fund from the CSRS system to the District of Columbia Police Officers' and Firefighters' Retirement Plan ("P&FRP"). Daniel retired in 2003 and received benefits from P&FRP. Janet has not received any benefits from either CSRS or P&FRP.

In 2006, Janet filed a post-divorce motion asking the court 1) to approve a QDRO directing the plan administrator of the P&FRP to pay Janet \$1,325.07 per month, 2) to award Janet a lump sum for benefits she alleges she is due but has not received from 2003 to the present, and 3) attorney fees. After much litigation on this motion, the trial court issued an order on January 9, 2009, awarding Janet \$1,325.07 per month from P&FRP beginning on January 1, 2009, \$76,185.92 in retroactive retirement benefits, and \$24,684 in attorney fees. The court ordered Janet to prepare a QDRO "as may be required by the pension administrator, so as to perfect Plaintiff's rights in said pension." The QDRO was prepared and signed by the trial court judge on January 9, 2009. The QDRO states:

"In the event any Order submitted to the Plan Administrator is held not to be a Qualified Domestic Relations Order within the meaning of the D.C. Spouse Equity Act of 1988, as amended, the parties shall submit to and request this Court * * * to amend or modify the Order [to make it compliant and] said amendment or modification Order is to be entered Nunc Pro Tunc if appropriate and Jurisdiction is hereby reserved for this purpose."

FAXED

E-JOURNALIZED

2.

JUL - 6 2009

Daniel filed a timely notice of appeal from the January 9, 2009 judgment and QDRO. This appeal was assigned No. L-09-1022.

On April 7, 2009, the trial court did enter an Amended Qualified Domestic Relations Order, presumably to comply with the requirements of P&FRP's Plan Administrator. Daniel filed a timely notice of appeal from this Amended QDRO and the second appeal was assigned No. L-09-1123.

On April 28, 2009, Daniel filed an original action in prohibition (L-09-1118) with this court against the trial court judge who signed the April 7, 2009 Amended QDRO, alleging that the judge lacked jurisdiction to sign that document while the case was on appeal to this court in appeal No. L-09-1022. Daniel sought an order prohibiting the judge from continuing to exercise jurisdiction in the case while it was on appeal in this court and an order vacating the April 7, 2009 Amended QDRO. On May 7, 2009, this court granted the writ, ordered the trial court judge to refrain from taking any action inconsistent with this court's ability to affirm, modify or reverse the January 9, 2009 orders, and vacated the April 7, 2009 Amended QDRO. Respondent, the trial court judge, has appealed our May 7, 2009 order to the Ohio Supreme Court.

On May 13, 2009, after this court vacated the trial court's April 7, 2009 Amended QDRO, we sua sponte dismissed appeal No. L-09-1123 which challenged the vacated Amended QDRO. The parties have now filed motions asking us to, inter alia, reconsider the dismissal of appeal No. L-09-1123.

FAXED

In Daniel's motion to reconsider, he states that he would like this court to reinstate appeal No. L-09-1123 and stay proceedings in this court pending final determination of the trial court judge's appeal to the Ohio Supreme Court. He argues that if the high court reverses our decision in the original action vacating the April 7, 2009 Amended QDRO, he would like to preserve his ability to appeal from the April order in appeal No. L-09-1123. If Daniel wants to protect his appeal from the April order, his path would be to appeal our sua sponte dismissal of that appeal to the Ohio Supreme Court. We have held that the April QDRO is void and Daniel has not argued that we are wrong in this determination. His motion to reconsider is denied.

Also before the court is the June 18, 2009 motion of appellee, Janet Sullivan, titled "Motion to Remand to Trial Court or in the Alternative, Motion for Reconsideration." Before we consider the merits of this motion, we must address Daniel's motion to strike Janet's June 18 motion. Daniel states that the motion should be stricken because Janet has not intervened in the prohibition action, No. L-09-1118, and that her evidence presented to the court in support of the motion is de hors the record. We fail to see how Janet's status as a non-party to the prohibition action disqualifies her from filing a motion in this appeal, No. L-09-1123, where she is the appellee. Further, the issue of whether evidence is de hors the record is one to consider in deciding the merits of the motion. Daniel's motion to strike Janet's June 18, 2009 motion is denied.

In her motion, Janet first avers that pursuant to Civ.R. 75(H), and *Buckles v. Buckles* (1988), 46 Ohio App.3d 118, the trial court retained jurisdiction to enter the

FAXED

April Amended QDRO. Further, she argues that our decision granting the writ of prohibition is the functional equivalent of a stay of the January 9, 2009 QDRO. While either or both of these statements may be true, they would be issues for the trial court judge to raise in the appeal to the Ohio Supreme Court in case No. L-09-1118.

The specific relief Janet seeks in her motion is that this court "issue an order remanding the issues related to the enforcement of the QDRO to the trial court" or in the alternative, "to reconsider its decision of May 13, 2009 and permit the trial court's April 7, 2009 Amended Qualified Domestic Relations Order to stand." Daniel has filed an extensive memorandum in opposition to Janet's motion, which in large part argues the merits of his position that the trial court erred in entering the January 2009 QDRO and the April Amended QDRO. These arguments are irrelevant to the issues presently before the court.

We need not address the arguments Janet makes in support of her motion to reconsider because the motion was not timely filed. App.R. 26(A) states that a motion for reconsideration must be filed "within ten days after the announcement of the court's decision." In this appellate district, decisions are announced "when they are entered on the court's journal." 6th Dist.Loc.App.R. 4. Our dismissal of this appeal was entered on the journal on May 13, 2009, and Janet's motion to reconsider was filed on June 8, 2009.

As to her motion to remand, as stated by Daniel in his memorandum in opposition, we cannot remand an appeal that has been dismissed in this court. The only appeal

FAXED

pending in this court is No. L-09-1022. Appellee's motion to reconsider and to remand is denied.

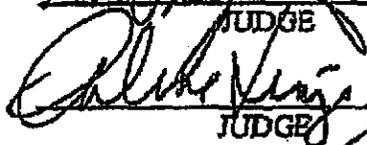
Mark L. Pietrykowski, J.

Arlene Singer, J.

Thomas J. Osowik, J.
CONCUR.



JUDGE



JUDGE



JUDGE

FAXED

26 USCS § 414

§ 414. Definitions and special rules.

(a) Service for predecessor employer. For purposes of this part [26 USCS §§ 401 et seq.]-

(1) in any case in which the employer maintains a plan of a predecessor employer, service for such predecessor shall be treated as service for the employer, and

(2) in any case in which the employer maintains a plan which is not the plan maintained by a predecessor employer, service for such predecessor shall, to the extent provided in regulations prescribed by the Secretary, be treated as service for the employer.

(b) Employees of controlled group of corporations. For purposes of sections 401, 408(k), 408(p), 410, 411, 415, and 416, [26 USCS §§ 401, 408(k), 408(p), 410, 411, 415, and 416] all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a) [26 USCS § 1563(a)], determined without regard to section 1563(a)(4) and (e)(3)(C) [26 USCS § 1563(a)(4), (e)(3)(C)]) shall be treated as employed by a single employer. With respect to a plan adopted by more than one such corporation, the applicable limitations provided by section 404(a) [26 USCS § 404(a)] shall be determined as if all such employers were a single employer, and allocated to each employer in accordance with regulations prescribed by the Secretary.

(c) Employees of partnerships, proprietorships, etc., which are under common control. For purposes of sections 401, 408(k), 408(p), 410, 411, 415, and 416 [26 USCS §§ 401, 408(k), 408(p), 410, 411, 415, and 416] under regulations prescribed by the Secretary, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer. The regulations prescribed under this subsection shall be based on principles similar to the principles which apply in the case of subsection (b).

(d) Governmental plan. For purposes of this part [26 USCS §§ 401 et seq.], the term "governmental plan" means a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation by reason of the International Organizations Immunities Act (59 Stat. 669). The term 'governmental plan' includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40) [26 USCS § 7701(a)(40)]), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) [26 USCS § 7871(d)]), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function).

(e) Church plan.

(1) In general. For purposes of this part [26 USCS §§ 401 et seq.], the term "church plan" means a plan established and maintained (to the extent required in paragraph (2)(B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 [26 USCS § 501].

(2) Certain plans excluded. The term "church plan" does not include a plan--

(A) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513 [26 USCS § 513]); or

(B) if less than substantially all of the individuals included in the plan are individuals described in paragraph (1) or (3)(B) (or their beneficiaries).

(3) Definitions and other provisions. For purposes of this subsection--

(A) Treatment as church plan. A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

(B) Employee defined. The term employee of a church or a convention or association of churches shall include--

(i) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

(ii) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 [26 USCS § 501] and which is controlled by or associated with a church or a convention or association of churches; and

(iii) an individual described in subparagraph (E).

(C) Church treated as employer. A church or a convention or association of churches which is exempt from tax under section 501 [26 USCS § 501] shall be deemed the employer of any individual included as an employee under subparagraph (B).

(D) Association with church. An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

(E) Special rule in case of separation from plan. If an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization described in clause (ii) of paragraph (3)(B), the church plan shall not fail to meet the requirements of this subsection merely because the plan--

(i) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or

(ii) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of section 72(m)(7) [26 USCS § 72(m)(7)]) at the time of such separation from service.

(4) Correction of failure to meet church plan requirements.

(A) In general. If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 [26 USCS § 501] fails to meet one or more of the requirements of this subsection and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this subsection for the year in which the correction was made and for all prior years.

(B) Failure to correct. If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this subsection beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

(C) Correction period defined. The term "correction period" means--

(i) the period ending 270 days after the date of mailing by the Secretary of a notice of default with respect to the plan's failure to meet one or more of the requirements of this subsection;

(ii) any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secretary on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or

(iii) any additional period which the Secretary determines is reasonable or necessary for the correction of the default,

whichever has the latest ending date.

(5) Special rules for chaplains and self-employed ministers.

(A) Certain ministers may participate. For purposes of this part--

(i) In general. A duly ordained, commissioned, or licensed minister of a church is described in paragraph (3)(B) if, in connection with the exercise of their ministry, the minister--

(I) is a self-employed individual (within the meaning of section 401(c)(1)(B) [26 USCS § 401(c)(1)(B)], or

(II) is employed by an organization other than an organization which is described in section 501(c)(3) [26 USCS § 501(c)(3)] and with respect to which the minister shares common religious bonds.

(ii) Treatment as employer and employee. For purposes of sections 403(b)(1)(A) and 404(a)(10) [26 USCS §§ 403(b)(1)(A) and 404(a)(10)], a minister described in clause (i)(I) shall be treated as employed by the minister's own employer which is an organization described in section 501(c)(3) [26 USCS § 501(c)(3)] and exempt from tax under section 501(a) [26 USCS § 501(a)].

(B) Special rules for applying section 403(b) [26 USCS § 403(b)] to self-employed ministers. In the case of a minister described in subparagraph (A)(i)(I)--

(i) the minister's includible compensation under section 403(b)(3) [26 USCS § 403(b)(3)] shall be determined by reference to the minister's earned income (within the meaning of section 401(c)(2) [26 USCS § 401(c)(2)]) from such ministry rather than the amount of compensation which is received from an employer, and

(ii) the years (and portions of years) in which such minister was a self-employed individual (within the meaning of section 401(c)(1)(B) [26 USCS § 401(c)(1)(B)]) with respect to such ministry shall be included for purposes of section 403(b)(4) [26 USCS §

403(b)(4)].

(C) Effect on non-denominational plans. If a duly ordained, commissioned, or licensed minister of a church in the exercise of his or her ministry participates in a church plan (within the meaning of this section) and in the exercise of such ministry is employed by an employer not otherwise participating in such church plan, then such employer may exclude such minister from being treated as an employee of such employer for purposes of applying sections 401(a)(3), 401(a)(4), and 401(a)(5) [26 USCS §§ 401(a)(3), 401(a)(4), and 401(a)(5)], as in effect on September 1, 1974, and sections 401(a)(4), 401(a)(5), 401(a)(26), 401(k)(3), 401(m), 403(b)(1)(D) [26 USCS §§ 401(a)(4), 401(a)(5), 401(a)(26), 401(k)(3), 401(m), 403(b)(1)(D)] (including section 403(b)(12) [26 USCS § 403(b)(12)]), and 410 [26 USCS § 410] to any stock bonus, pension, profit-sharing, or annuity plan (including an annuity described in section 403(b) [26 USCS § 403(b)] or a retirement income account described in section 403(b)(9) [26 USCS § 403(b)(9)]). The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purpose of, and prevent the abuse of, this subparagraph.

(D) Compensation taken into account only once. If any compensation is taken into account in determining the amount of any contributions made to, or benefits to be provided under, any church plan, such compensation shall not also be taken into account in determining the amount of any contributions made to, or benefits to be provided under, any other stock bonus, pension, profit-sharing, or annuity plan which is not a church plan.

(E) Exclusion. In the case of a contribution to a church plan made on behalf of a minister described in subparagraph (A)(i)(II), such contribution shall not be included in the gross income of the minister to the extent that such contribution would not be so included if the minister was an employee of a church.

(f) Multiemployer plan.

(1) Definition. For purposes of this part [26 USCS §§ 401 et seq.], the term "multiemployer plan" means a plan--

(A) to which more than one employer is required to contribute,

(B) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and

(C) which satisfies such other requirements as the Secretary of Labor may prescribe by regulation.

(2) Cases of common control. For purposes of this subsection, all trades or businesses (whether or not incorporated) which are under common control within the meaning of subsection (c) are considered a single employer.

(3) Continuation of status after termination. Notwithstanding paragraph (1), a plan is a multiemployer plan on and after its termination date under title IV of the Employee Retirement Income Security Act of 1974 [29 USCS §§ 1301 et seq.] if the plan was a multiemployer plan under this subsection for the plan year preceding its termination date.

(4) Transitional rule. For any plan year which began before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980 [enacted Sept. 26, 1980], the term "multiemployer plan" means a plan described in this subsection as in effect immediately before that date.

(5) Special election. Within one year after the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980 [enacted Sept. 26, 1980], a

multiemployer plan may irrevocably elect, pursuant to procedures established by the Pension Benefit Guaranty Corporation and subject to the provisions of section 4403 [4303] (b) and (c) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1453(b) and (c)], that the plan shall not be treated as a multiemployer plan for any purpose under such Act or this title, if for each of the last 3 plan years ending prior to the effective date of the Multiemployer Pension Plan Amendments Act of 1980--

(A) the plan was not a multiemployer plan because the plan was not a plan described in section 3(37)(A)(iii) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1002(37)(A)(iii)] and section 414(f)(1)(C) [26 USCS § 414(f)(1)(C)] (as such provisions were in effect on the day before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980 [enacted Sept. 26, 1980]); and

(B) the plan had been identified as a plan that was not a multiemployer plan in substantially all its filings with the Pension Benefit Guaranty Corporation, the Secretary of Labor and the Secretary.

(6) Election with regard to multiemployer status.

(A) Within 1 year after the enactment of the Pension Protection Act of 2006 [enacted Aug. 17, 2006]--

(i) An election under paragraph (5) may be revoked, pursuant to procedures prescribed by the Pension Benefit Guaranty Corporation, if, for each of the 3 plan years prior to the date of the enactment of that Act, the plan would have been a multiemployer plan but for the election under paragraph (5), and

(ii) a plan that meets the criteria in subparagraph (A) and (B) of paragraph (1) of this subsection or that is described in subparagraph (E) may, pursuant to procedures prescribed by the Pension Benefit Guaranty Corporation, elect to be a multiemployer plan, if--

(I) for each of the 3 plan years immediately preceding the first plan year for which the election under this paragraph is effective with respect to the plan, the plan has met those criteria or is so described,

(II) substantially all of the plan's employer contributions for each of those plan years were made or required to be made by organizations that were exempt from tax under section 501 [26 USCS § 501], and

(III) the plan was established prior to September 2, 1974.

(B) An election under this paragraph shall be effective for all purposes under this Act and under the Employee Retirement Income Security Act of 1974, starting with any plan year beginning on or after January 1, 1999, and ending before January 1, 2008, as designated by the plan in the election made under subparagraph (A)(ii).

(C) Once made, an election under this paragraph shall be irrevocable, except that a plan described in subparagraph (A)(ii) shall cease to be a multiemployer plan as of the plan year beginning immediately after the first plan year for which the majority of its employer contributions were made or required to be made by organizations that were not exempt from tax under section 501 [26 USCS § 501].

(D) The fact that a plan makes an election under subparagraph (A)(ii) does not imply that the plan was not a multiemployer plan prior to the date of the election or would not be a multiemployer plan without regard to the election.

(E) A plan is described in this subparagraph if it is a plan sponsored by an organization which is described in section 501(c)(5) [26 USCS § 501(c)(5)] and exempt

from tax under section 501(a) [26 USCS § 501(a)] and which was established in Chicago, Illinois, on August 12, 1881.

(F) Maintenance under collective bargaining agreement. For purposes of this title and the Employee Retirement Income Security Act of 1974, a plan making an election under this paragraph shall be treated as maintained pursuant to a collective bargaining agreement if a collective bargaining agreement, expressly or otherwise, provides for or permits employer contributions to the plan by one or more employers that are signatory to such agreement, or participation in the plan by one or more employees of an employer that is signatory to such agreement, regardless of whether the plan was created, established, or maintained for such employees by virtue of another document that is not a collective bargaining agreement.

(g) Plan administrator. For purposes of this part [26 USCS §§ 401 et seq.], the term "plan administrator" means--

(1) the person specifically so designated by the terms of the instrument under which the plan is operated;

(2) in the absence of a designation referred to in paragraph (1)--

(A) in the case of a plan maintained by a single employer, such employer,

(B) in the case of a plan maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who maintained the plan, or

(C) in any case to which subparagraph (A) or (B) does not apply, such other person as the Secretary may by regulation, prescribe.

(h) Tax treatment of certain contributions.

(1) In general. Effective with respect to taxable years beginning after December 31, 1973, for purposes of this title, any amount contributed--

(A) to an employees' trust described in section 401(a) [26 USCS § 401(a)], or

(B) under a plan described in section 403(a) [26 USCS § 403(a)], shall not be treated as having been made by the employer if it is designated as an employee contribution.

(2) Designation by units of government. For purposes of paragraph (1), in the case of any plan established by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing, or a governmental plan described in the last sentence of section 414(d) [subsec. (d) of this section] (relating to plans of Indian tribal governments), where the contributions of employing units are designated as employee contributions but where any employing unit picks up the contributions, the contributions so picked up shall be treated as employer contributions.

(i) Defined contribution plan. For purposes of this part [26 USCS §§ 401 et seq.], the term "defined contribution plan" means a plan which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(j) Defined benefit plan. For purposes of this part [26 USCS §§ 401 et seq.], the term

"defined benefit plan" means any plan which is not a defined contribution plan.

(k) Certain plans. A defined benefit plan which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant shall--

(1) for purposes of section 410 [26 USCS § 410] (relating to minimum participation standards), be treated as a defined contribution plan,

(2) for purposes of sections 72(d) [26 USCS § 72(d)] (relating to treatment of employee contributions as separate contract), 411(a)(7)(A) [26 USCS § 411(a)(7)(A)] (relating to minimum vesting standards), 415 [26 USCS § 415] (relating to limitations on benefits and contributions under qualified plans), and 401(m) [26 USCS § 410(m)] (relating to nondiscrimination tests for matching requirements and employee contributions), be treated as consisting of a defined contribution plan to the extent benefits are based on the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan, and

(3) for purposes of section 4975 [26 USCS § 4975] (relating to tax on prohibited transactions), be treated as a defined benefit plan.

(l) Merger and consolidations of plans or transfers of plan assets.

(1) In general. A trust which forms a part of a plan shall not constitute a qualified trust under section 401 [26 USCS § 401] and a plan shall be treated as not described in section 403(a) [26 USCS § 403(a)] unless in the case of any merger or consolidation of the plan with, or in the case of any transfer of assets or liabilities of such plan to, any other trust plan after September 2, 1974, each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). The preceding sentence does not apply to any multiemployer plan with respect to any transaction to the extent that participants either before or after the transaction are covered under a multiemployer plan to which title IV of the Employee Retirement Income Security Act of 1974 [29 USCS §§ 1301 et seq.] applies.

(2) Allocation of assets in plan spin-offs, etc.

(A) In general. In the case of a plan spin-off of a defined benefit plan, a trust which forms part of--

(i) the original plan, or

(ii) any plan spun off from such plan, shall not constitute a qualified trust under this section unless the applicable percentage of excess assets are allocated to each of such plans.

(B) Applicable percentage. For purposes of subparagraph (A), the term "applicable percentage" means, with respect to each of the plans described in clauses (i) and (ii) of subparagraph (A), the percentage determined by dividing--

(i) the excess (if any) of--

(I) the sum of the funding target and target normal cost determined under section 430 [26 USCS § 430], over

(II) the amount of the assets required to be allocated to the plan after the spin-off (without regard to this paragraph), by

(ii) the sum of the excess amounts determined separately under clause (i) for all such plans.

(C) Excess assets. For purposes of subparagraph (A), the term "excess assets" means an amount equal to the excess (if any) of--

(i) the fair market value of the assets of the original plan immediately before the spin-off, over

(ii) the amount of assets required to be allocated after the spin-off to all plans (determined without regard to this paragraph).

(D) Certain spun-off plans not taken into account.

(i) In general. A plan involved in a spin-off which is described in clause (ii), (iii), or (iv) shall not be taken into account for purposes of this paragraph, except that the amount determined under subparagraph (C)(ii) shall be increased by the amount of assets allocated to such plan.

(ii) Plans transferred out of controlled groups. A plan is described in this clause if, after such spin-off, such plan is maintained by an employer who is not a member of the same controlled group as the employer maintaining the original plan.

(iii) Plans transferred out of multiple employer plans. A plan as described in this clause if, after the spin-off, any employer maintaining such plan (and any member of the same controlled group as such employer) does not maintain any other plan remaining after the spin-off which is also maintained by another employer (or member of the same controlled group as such other employer) which maintained the plan in existence before the spin-off.

(iv) Terminated plans. A plan is described in this clause if, pursuant to the transaction involving the spin-off, the plan is terminated.

(v) Controlled group. For purposes of this subparagraph, the term "controlled group" means any group treated as a single employer under subsection (b), (c), (m), or (o).

(E) Paragraph not to apply to multiemployer plans. This paragraph does not apply to any multiemployer plan with respect to any spin-off to the extent that participants either before or after the spin-off are covered under a multiemployer plan to which title IV of the Employee Retirement Income Security Act of 1974 [29 USCS §§ 1301 et seq.] applies.

(F) Application to similar transaction. Except as provided by the Secretary, rules similar to the rules of this paragraph shall apply to transactions similar to spin-offs.

(G) Special rules for bridge banks. For purposes of this paragraph, in the case of a bridge depository institution established under section 11(i) of the Federal Deposit Insurance Act (12 U.S.C. 1821(i))--

(i) such bank shall be treated as a member of any controlled group which includes any insured bank (as defined in section 3(h) of such Act (12 U.S.C. 1813(h))--

(I) which maintains a defined benefit plan,

(II) which is closed by the appropriate bank regulatory authorities, and

(III) any asset and liabilities of which are received by the bridge depository institution, and

(ii) the requirements of this paragraph shall not be treated as met with respect to such plan unless during the 180-day period beginning on the date such insured bank is closed--

(I) the bridge depository institution has the right to require the plan to transfer (subject to the provisions of this paragraph) not more than 50 percent of the excess assets (as defined in subparagraph (C)) to a defined benefit plan maintained by the bridge depository institution with respect to participants or former participants (including retirees and beneficiaries) in the original plan employed by the bridge depository institution or formerly employed by the closed bank, and

(II) no other merger, spin-off, termination, or similar transaction involving the portion of the excess assets described in subclause (I) may occur without the prior written consent of the bridge depository institution.

(m) Employees of an affiliated service group.

(1) In general. For purposes of the employee benefit requirements listed in paragraph (4), except to the extent otherwise provided in regulations, all employees of the members of an affiliated service group shall be treated as employed by a single employer.

(2) Affiliated service group. For purposes of this subsection, the term "affiliated service group" means a group consisting of a service organization (hereinafter in this paragraph referred to as the "first organization") and one or more of the following:

(A) any service organization which--

(i) is a shareholder or partner in the first organization, and

(ii) regularly performs services for the first organization or is regularly associated with the first organization in performing services for third persons, and

(B) any other organization if--

(i) a significant portion of the business of such organization is the performance of services (for the first organization, for organizations described in subparagraph (A), or for both) of a type historically performed in such service field by employees, and

(ii) 10 percent or more of the interests in such organization is held by persons who are highly compensated employees (within the meaning of section 414(q) [26 USCS § 414(q)]) of the first organization or an organization described in subparagraph (A).

(3) Service organizations. For purposes of this subsection, the term "service organization" means an organization the principal business of which is the performance of services.

(4) Employee benefit requirements. For purposes of this subsection, the employee benefit requirements listed in this paragraph are--

(A) paragraphs (3), (4), (7), (16), (17), and (26) of section 401(a) [26 USCS § 401(a)], and

(B) sections 408(k), 408(p), 410, 411, 415, and 416 [26 USCS §§ 408(k), 408(p), 410, 411, 415, and 416].

(5) Certain organizations performing management functions. For purposes of this subsection, the term "affiliated service group" also includes a group consisting of--

(A) an organization the principal business of which is performing, on a regular and continuing basis, management functions for 1 organization (or for 1 organization and other organizations related to such 1 organization), and

(B) the organization (and related organizations) for which such functions are so performed by the organization described in subparagraph (A).

For purposes of this paragraph, the term "related organizations" has the same meaning as the term "related persons" when used in section 144(a)(3) [26 USCS § 144(a)(3)].

(6) Other definitions. For purposes of this subsection--

(A) Organization defined. The term "organization" means a corporation, partnership, or other organization.

(B) Ownership. In determining ownership, the principles of section 318(a) [26 USCS § 318(a)] shall apply.

(n) Employee leasing.

(1) In general. For purposes of the requirements listed in paragraph (3), with respect to any person (hereinafter in this subsection referred to as the "recipient") for whom a leased employee performs services--

(A) the leased employee shall be treated as an employee of the recipient, but

(B) contributions or benefits provided by the leasing organization which are attributable to services performed for the recipient shall be treated as provided by the recipient.

(2) Leased employee. For purposes of paragraph (1), the term "leased employee" means any person who is not an employee of the recipient and who provides services to the recipient if--

(A) such services are provided pursuant to an agreement between the recipient and any other person (in this subsection referred to as the "leasing organization"),

(B) such person has performed such services for the recipient (or for the recipient and related persons) on a substantially full-time basis for a period of at least 1 year, and

(C) such services are performed under primary direction or control by the recipient.

(3) Requirements. For purposes of this subsection, the requirements listed in this paragraph are--

(A) paragraphs (3), (4), (7), (16), (17), and (26) of section 401(a) [26 USCS § 401(a)],

(B) sections 408(k), 408(p), 410, 411, 415, and 416 [26 USCS §§ 408(k), 408(p), 410, 411, 415, and 416], and

(C) sections 79, 106, 117(d), 120, 125, 127, 129, 132, 137, 274(j), 505, and 4980B [26 USCS §§ 79, 106, 117(d), 120, 125, 127, 129, 132, 137, 274(j), 505, and 4980B].

(4) Time when first considered as employee.

(A) In general. In the case of any leased employee, paragraph (1) shall apply only for purposes of determining whether the requirements listed in paragraph (3) are met for periods after the close of the period referred to in paragraph (2)(B).

(B) Years of service. In the case of a person who is an employee of the recipient (whether by reason of this subsection or otherwise), for purposes of the requirements listed in paragraph (3), years of service for the recipient shall be determined by taking into account any period for which such employee would have been a leased employee but for the requirements of paragraph (2)(B).

(5) Safe harbor.

(A) In general. In the case of requirements described in subparagraphs (A) and (B) of paragraph (3), this subsection shall not apply to any leased employee with respect to services performed for a recipient if--

(i) such employee is covered by a plan which is maintained by the leasing organization and meets the requirements of subparagraph (B), and

(ii) leased employees (determined without regard to this paragraph) do not

constitute more than 20 percent of the recipient's nonhighly compensated work force.

(B) Plan requirements. A plan meets the requirements of this subparagraph if--

- (i) such plan is a money purchase pension plan with a nonintegrated employer contribution rate for each participant of at least 10 percent of compensation,
- (ii) such plan provides for full and immediate vesting, and
- (iii) each employee of the leasing organization (other than employees who perform substantially all of their services for the leasing organization) immediately participates in such plan.

Clause (iii) shall not apply to any individual whose compensation from the leasing organization in each plan year during the 4-year period ending with the plan year is less than \$ 1,000.

(C) Definitions. For purposes of this paragraph--

(i) Highly compensated employee. The term "highly compensated employee" has the meaning given such term by section 414(q) [26 USCS § 414(q)].

(ii) Nonhighly compensated work force. The term "nonhighly compensated work force" means the aggregate number of individuals (other than highly compensated employees)--

(I) who are employees of the recipient (without regard to this subsection) and have performed services for the recipient (or for the recipient and related persons) on a substantially full-time basis for a period of at least 1 year, or

(II) who are leased employees with respect to the recipient (determined without regard to this paragraph).

(iii) Compensation. The term "compensation" has the same meaning as when used in section 415 [26 USCS § 415]; except that such term shall include--

(I) any employer contribution under a qualified cash or deferred arrangement to the extent not included in gross income under section 402(e)(3) or 402(h)(1)(B) [26 USCS § 402(e)(3) or 402(h)(1)(B)],

(II) any amount which the employee would have received in cash but for an election under a cafeteria plan (within the meaning of section 125 [26 USCS § 125]), and

(III) any amount contributed to an annuity contract described in section 403(b) [26 USCS § 403(b)] pursuant to a salary reduction agreement (within the meaning of section 3121(a)(5)(D) [26 USCS § 3121(a)(5)(D)]).

(6) Other rules. For purposes of this subsection--

(A) Related persons. The term "related persons" has the same meaning as when used in section 144(a)(3) [26 USCS § 144(a)(3)].

(B) Employees of entities under common control. The rules of subsections (b), (c), (m), and (o) shall apply.

(o) Regulations. The Secretary shall prescribe such regulations (which may provide rules in addition to the rules contained in subsections (m) and (n)) as may be necessary to prevent the avoidance of any employee benefit requirement listed in subsection (m)(4) or (n)(3) or any requirement under section 457 [26 USCS § 457] through the use of--

- (1) separate organizations,
- (2) employee leasing, or
- (3) other arrangements.

The regulations prescribed under subsection (n) shall include provisions to minimize the recordkeeping requirements of subsection (n) in the case of an employer which has no top-heavy plans (within the meaning of section 416(g) [26 USCS § 416(g)]) and which uses the services of persons (other than employees) for an insignificant percentage of the employer's total workload.

(p) Qualified domestic relations order defined. For purposes of this subsection and section 401(a)(13) [26 USCS § 401(a)(13)] --

(1) In general.

(A) Qualified domestic relations order. 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 paragraphs (2) and (3) are met.

(B) Domestic relations order. 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).

(2) Order must clearly specify certain facts. A domestic relations order meets the requirements of this paragraph only if such order clearly specifies--

(A) 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,

(B) 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,

(C) the number of payments or period to which such order applies, and

(D) each plan to which such order applies.

(3) Order may not alter amount, form, etc., of benefits. A domestic relations order meets the requirements of this paragraph only if such order--

(A) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(B) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(C) does not 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 domestic relations order.

(4) Exception for certain payments made after earliest retirement age.

(A) In general. A domestic relations order shall not be treated as failing to meet the requirements of subparagraph (A) of paragraph (3) solely because such order requires that payment of benefits be made to an alternate payee--

(i) in the case of any payment before a participant has separated from service, on or after the date on which the participant attains (or would have attained) the earliest

retirement age,

(ii) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of the benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(iii) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

For purposes of clause (ii), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(B) Earliest retirement age. For purposes of this paragraph, the term "earliest retirement age" means the earlier of--

(i) the date on which the participant is entitled to a distribution under the plan, or

(ii) the later of--

(I) the date the participant attains age 50, or

(II) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

(5) Treatment of former spouse as surviving spouse for purposes of determining survivor benefits. To the extent provided in any qualified domestic relations order--

(A) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of sections 401(a)(11) and 417 [26 USCS § 401(a)(11) and 417] (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and

(B) if married for at least 1 year, the surviving former spouse shall be treated as meeting the requirements of section 417(d) [26 USCS § 417(d)].

(6) Plan procedures with respect to orders.

(A) Notice and determination by administrator. In the case of any domestic relations order received by a plan--

(i) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and

(ii) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(B) Plan to establish reasonable procedures. Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders.

(7) Procedures for period during which determination is being made.

(A) In general. During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this paragraph referred to as the "segregated amounts") which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.

(B) Payment to alternate payee if order determined to be qualified domestic relations

order. If within the 18-month period described in subparagraph (E) the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.

(C) Payment to plan participant in certain cases. If within the 18-month period described in subparagraph (E)--

(i) it is determined that the order is not a qualified domestic relations order, or

(ii) the issue as to whether such order is a qualified domestic relations order is not resolved,

then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.

(D) Subsequent determination or order to be applied prospectively only. Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in subparagraph (E) shall be applied prospectively only.

(E) Determination of 18-month period. For purposes of this paragraph, the 18-month period described in this subparagraph is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

(8) Alternate payee defined. The term "alternate payee" means any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

(9) Subsection not to apply to plans to which section 401(a)(13) does not apply. This subsection shall not apply to any plan to which section 401(a)(13) [26 USCS § 401(a)(13)] does not apply. For purposes of this title, except as provided in regulations, any distribution from an annuity contract under section 403(b) [26 USCS § 403(b)] pursuant to a qualified domestic relations order shall be treated in the same manner as a distribution from a plan to which section 401(a)(13) [26 USCS § 401(a)(13)] applies.

(10) Waiver of certain distribution requirements. With respect to the requirements of subsections (a) and (k) of section 401 [26 USCS § 401], section 403(b) [26 USCS § 403(b)], section 409(d) [26 USCS § 409(d)], and section 457(d) [26 USCS § 457(d)], a plan shall not be treated as failing to meet such requirements solely by reason of payments to an alternative payee pursuant to a qualified domestic relations order.

(11) Application of rules to certain other plans. For purposes of this title, a distribution or payment from a governmental plan (as defined in subsection (d)) or a church plan (as described in subsection (e)) or an eligible deferred compensation plan (within the meaning of section 457(b) [26 USCS § 457(b)]) shall be treated as made pursuant to a qualified domestic relations order if it is made pursuant to a domestic relations order which meets the requirement of clause (i) of paragraph (1)(A).

(12) Tax treatment of payments from a section 457 plan. If a distribution or payment from an eligible deferred compensation plan described in section 457(b) [26 USCS § 457(b)] is made pursuant to a qualified domestic relations order, rules similar to the rules of section 402(e)(1)(A) [26 USCS § 402(e)(1)(A)] shall apply to such distribution or payment.

(13) Consultation with the Secretary. In prescribing regulations under this subsection

and section 401(a)(13) [26 USCS § 401(a)(13)], the Secretary of Labor shall consult with the Secretary.

(q) Highly compensated employee.

(1) In general. The term "highly compensated employee" means any employee who--

(A) was a 5-percent owner at any time during the year or the preceding year, or

(B) for the preceding year--

(i) had compensation from the employer in excess of \$ 80,000, and

(ii) if the employer elects the application of this clause for such preceding year, was in the top-paid group of employees for such preceding year.

The Secretary shall adjust the \$ 80,000 amount under subparagraph (B) at the same time and in the same manner as under section 415(d) [26 USCS § 415(d)], except that the base period shall be the calendar quarter ending September 30, 1996.

(2) 5-percent owner. An employee shall be treated as a 5-percent owner for any year if at any time during such year such employee was a 5-percent owner (as defined in section 416(i)(1) [26 USCS § 416(i)(1)]) of the employer.

(3) Top-paid group. An employee is in the top-paid group of employees for any year if such employee is in the group consisting of the top 20 percent of the employees when ranked on the basis of compensation paid during such year.

(4) Compensation. For purposes of this subsection, the term "compensation" has the meaning given such term by section 415(c)(3) [26 USCS § 415(c)(3)].

(5) Excluded employees. For purposes of subsection (r) and for purposes of determining the number of employees in the top-paid group, the following employees shall be excluded--

(A) employees who have not completed 6 months of service,

(B) employees who normally work less than 17 1/2 hours per week,

(C) employees who normally work during not more than 6 months during any year,

(D) employees who have not attained age 21, and

(E) except to the extent provided in regulations, employees who are included in a unit of employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and the employer.

Except as provided by the Secretary, the employer may elect to apply subparagraph (A), (B), (C), or (D) by substituting a shorter period of service, smaller number of hours or months, or lower age for the period of service, number of hours or months, or age (as the case may be) than that specified in such subparagraph.

(6) Former employees. A former employee shall be treated as a highly compensated employee if--

(A) such employee was a highly compensated employee when such employee separated from service, or

(B) such employee was a highly compensated employee at any time after attaining age 55.

(7) Coordination with other provisions. Subsections (b), (c), (m), (n), and (o) shall be applied before the application of this subsection.

(8) Special rule for nonresident aliens. For purposes of this subsection and subsection (r), employees who are nonresident aliens and who receive no earned income (within the meaning of section 911(d)(2) [26 USCS § 911(d)(2)]) from the employer which

constitutes income from sources within the United States (within the meaning of section 861(a)(3) [26 USCS § 861(a)(3)]) shall not be treated as employees.

(9) Certain employees not considered highly compensated and excluded employees under pre-ERISA rules for church plans. In the case of a church plan (as defined in subsection (e)), no employee shall be considered an officer, a person whose principal duties consist of supervising the work of other employees, or a highly compensated employee for any year unless such employee is a highly compensated employee under paragraph (1) for such year.

(r) Special rules for separate line of business.

(1) In general. For purposes of sections 129(d)(8) and 410(b) [26 USCS §§ 129(d)(8) and 410(b)], an employer shall be treated as operating separate lines of business during any year if the employer for bona fide business reasons operates separate lines of business.

(2) Line of business must have 50 employees, etc. A line of business shall not be treated as separate under paragraph (1) unless--

(A) such line of business has at least 50 employees who are not excluded under subsection (q)(5),

(B) the employer notifies the Secretary that such line of business is being treated as separate for purpose of paragraph (1), and

(C) such line of business meets guidelines prescribed by the Secretary or the employer receives a determination from the Secretary that such line of business may be treated as separate for purposes of paragraph (1).

(3) Safe harbor rule.

(A) In general. The requirements of subparagraph (C) of paragraph (2) shall not apply to any line of business if the highly compensated employee percentage with respect to such line of business is--

(i) not less than one-half, and

(ii) not more than twice, the percentage which highly compensated employees are of all employees of the employer. An employer shall be treated as meeting the requirements of clause (i) if at least 10 percent of all highly compensated employees of the employer perform services solely for such line of business.

(B) Determination may be based on preceding year. The requirements of subparagraph (A) shall be treated as met with respect to any line of business if such requirements were met with respect to such line of business for the preceding year and if--

(i) no more than a de minimis number of employees were shifted to or from the line of business after the close of the preceding year, or

(ii) the employees shifted to or from the line of business after the close of the preceding year contained a substantially proportional number of highly compensated employees.

(4) Highly compensated employee percentage defined. For purposes of this subsection, the term "highly compensated employee percentage" means the percentage which highly compensated employees performing services for the line of business are of all employees performing services for the line of business.

(5) Allocation of benefits to line of business. For purposes of this subsection, benefits

which are attributable to services provided to a line of business shall be treated as provided by such line of business.

(6) Headquarters personnel, etc. The Secretary shall prescribe rules providing for--

(A) the allocation of headquarters personnel among the lines of business of the employer, and

(B) the treatment of other employees providing services for more than 1 line of business of the employer or not in lines of business meeting the requirements of paragraph (2).

(7) Separate operating units. For purposes of this subsection, the term "separate line of business" includes an operating unit in a separate geographic area separately operated for a bona fide business reason.

(8) Affiliated service groups. This subsection shall not apply in the case of any affiliated service group (within the meaning of section 414(m) [26 USCS § 414(m)]).

(s) Compensation. For purposes of any applicable provision--

(1) In general. Except as provided in this subsection, the term "compensation" has the meaning given such term by section 415(c)(3) [26 USCS § 415(c)(3)].

(2) Employer may elect not to treat certain deferrals as compensation. An employer may elect not to include as compensation any amount which is contributed by the employer pursuant to a salary reduction agreement and which is not includible in the gross income of an employee under section 125, 132(f)(4), 402(e)(3), 402(h), or 403(b) [26 USCS § 125, 132(f)(4), 402(e)(3), 402(h), or 403(b)].

(3) Alternative determination of compensation. The Secretary shall by regulation provide for alternative methods of determining compensation which may be used by an employer, except that such regulations shall provide that an employer may not use an alternative method if the use of such method discriminates in favor of highly compensated employees (within the meaning of subsection (q)).

(4) Applicable provision. For purposes of this subsection, the term "applicable provision" means any provision which specifically refers to this subsection.

(t) Application of controlled group rules to certain employee benefits.

(1) In general. All employees who are treated as employed by a single employer under subsection (b), (c), or (m) shall be treated as employed by a single employer for purposes of an applicable section. The provisions of subsection (o) shall apply with respect to the requirements of an applicable section.

(2) Applicable section. For purposes of this subsection, the term "applicable section" means section 79, 106, 117(d), 120, 125, 127, 129, 132, 137, 274(j), 505, or 4980B [26 USCS § 79, 106, 117(d), 120, 125, 127, 129, 132, 137, 274(j), 505, or 4980B].

(u) Special rules relating to veterans' reemployment rights under USERRA and to differential wage payments to members on active duty.

(1) Treatment of certain contributions made pursuant to veterans' reemployment rights. If any contribution is made by an employer or an employee under an individual account plan with respect to an employee, or by an employee to a defined benefit plan that provides for employee contributions, and such contribution is required by reason of such employee's rights under chapter 43 of title 38, United States Code [38 USCS §§ 4301 et

seq.], resulting from qualified military service, then--

(A) such contribution shall not be subject to any otherwise applicable limitation contained in section 402(g), 402(h), 403(b), 404(a), 404(h), 408, 415, or 457 [26 USCS § 402(g), 402(h), 403(b), 403(b), 404(a), 404(h), 408, 415, or 457], and shall not be taken into account in applying such limitations to other contributions or benefits under such plan or any other plan, with respect to the year in which the contribution is made,

(B) such contribution shall be subject to the limitations referred to in subparagraph (A) with respect to the year to which the contribution relates (in accordance with rules prescribed by the Secretary), and

(C) such plan shall not be treated as failing to meet the requirements of section 401(a)(4), 401(a)(26), 401(k)(3), 401(k)(11), 401(k)(12), 401(m), 403(b)(12), 408(k)(3), 408(k)(6), 408(p), 410(b), or 416 [26 USCS § 401(a)(4), 401(a)(26), 401(k)(3), 401(k)(11), 401(k)(12), 401(m), 403(b)(12), 408(k)(3), 408(k)(6), 408(p), 410(b), or 416] by reason of the making of (or the right to make) such contribution.

For purposes of the preceding sentence, any elective deferral or employee contribution made under paragraph (2) shall be treated as required by reason of the employee's rights under such chapter 43.

(2) Reemployment rights under USERRA with respect to elective deferrals.

(A) In general. For purposes of this subchapter and section 457 [26 USCS § 457], if an employee is entitled to the benefits of chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], with respect to any plan which provides for elective deferrals, the employer sponsoring the plan shall be treated as meeting the requirements of such chapter 43 with respect to such elective deferrals only if such employer--

(i) permits such employee to make additional elective deferrals under such plan (in the amount determined under subparagraph (B) or such lesser amount as is elected by the employee) during the period which begins on the date of the reemployment of such employee with such employer and has the same length as the lesser of--

(I) the product of 3 and the period of qualified military service which resulted in such rights, and

(II) 5 years, and

(ii) makes a matching contribution with respect to any additional elective deferral made pursuant to clause (i) which would have been required had such deferral actually been made during the period of such qualified military service.

(B) Amount of makeup required. The amount determined under this subparagraph with respect to any plan is the maximum amount of the elective deferrals that the individual would have been permitted to make under the plan in accordance with the limitations referred to in paragraph (1)(A) during the period of qualified military service if the individual had continued to be employed by the employer during such period and received compensation as determined under paragraph (7). Proper adjustment shall be made to the amount determined under the preceding sentence for any elective deferrals actually made during the period of such qualified military service.

(C) Elective deferral. For purposes of this paragraph, the term "elective deferral" has the meaning given such term by section 402(g)(3) [26 USCS § 402(g)(3)]; except that such term shall include any deferral of compensation under an eligible deferred compensation plan (as defined in section 457(b) [26 USCS § 457(b)]).

(D) After-tax employee contributions. References in subparagraphs (A) and (B) to

elective deferrals shall be treated as including references to employee contributions.

(3) Certain retroactive adjustments not required. For purposes of this subchapter and subchapter E [26 USCS §§ 401 et seq. and 441 et seq.], no provision of chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], shall be construed as requiring--

(A) any crediting of earnings to an employee with respect to any contribution before such contribution is actually made, or

(B) any allocation of any forfeiture with respect to the period of qualified military service.

(4) Loan repayment suspensions permitted. If any plan suspends the obligation to repay any loan made to an employee from such plan for any part of any period during which such employee is performing service in the uniformed services (as defined in chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.]), whether or not qualified military service, such suspension shall not be taken into account for purposes of section 72(p), 401(a), or 4975(d)(1) [26 USCS § 72(p), 401(a), or 4975(d)(1)].

(5) Qualified military service. For purposes of this subsection, the term "qualified military service" means any service in the uniformed services (as defined in chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.]) by any individual if such individual is entitled to reemployment rights under such chapter with respect to such service.

(6) Individual account plan. For purposes of this subsection, the term "individual account plan" means any defined contribution plan (including any tax-sheltered annuity plan under section 403(b) [26 USCS § 403(b)], any simplified employee pension under section 408(k) [26 USCS § 408(k)], any qualified salary reduction arrangement under section 408(p) [26 USCS § 408(p)], and any eligible deferred compensation plan (as defined in section 457(b) [26 USCS § 457(b)]).

(7) Compensation. For purposes of sections 403(b)(3), 415(c)(3), and 457(e)(5) [26 USCS §§ 403(b)(3), 415(c)(3), and 457(e)(5)], an employee who is in qualified military service shall be treated as receiving compensation from the employer during such period of qualified military service equal to--

(A) the compensation the employee would have received during such period if the employee were not in qualified military service, determined based on the rate of pay the employee would have received from the employer but for absence during the period of qualified military service, or

(B) if the compensation the employee would have received during such period was not reasonably certain, the employee's average compensation from the employer during the 12-month period immediately preceding the qualified military service (or, if shorter, the period of employment immediately preceding the qualified military service).

(8) USERRA requirements for qualified retirement plans. For purposes of this subchapter [26 USCS §§ 401 et seq.] and section 457 [26 USCS § 457], an employer sponsoring a retirement plan shall be treated as meeting the requirements of chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], only if each of the following requirements is met:

(A) An individual reemployed under such chapter is treated with respect to such plan as not having incurred a break in service with the employer maintaining the plan by reason of such individual's period of qualified military service.

(B) Each period of qualified military service served by an individual is, upon

reemployment under such chapter, deemed with respect to such plan to constitute service with the employer maintaining the plan for the purpose of determining the nonforfeitability of the individual's accrued benefits under such plan and for the purpose of determining the accrual of benefits under such plan.

(C) An individual reemployed under such chapter is entitled to accrued benefits that are contingent on the making of, or derived from, employee contributions or elective deferrals only to the extent the individual makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the individual would have been permitted or required to contribute had the individual remained continuously employed by the employer throughout the period of qualified military service. Any payment to such plan shall be made during the period beginning with the date of reemployment and whose duration is 3 times the period of the qualified military service (but not greater than 5 years).

(9) Treatment in the case of death or disability resulting from active military service.

(A) In general. For benefit accrual purposes, an employer sponsoring a retirement plan may treat an individual who dies or becomes disabled (as defined under the terms of the plan) while performing qualified military service with respect to the employer maintaining the plan as if the individual has resumed employment in accordance with the individual's reemployment rights under chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], on the day preceding death or disability (as the case may be) and terminated employment on the actual date of death or disability. In the case of any such treatment, and subject to subparagraphs (B) and (C), any full or partial compliance by such plan with respect to the benefit accrual requirements of paragraph (8) with respect to such individual shall be treated for purposes of paragraph (1) as if such compliance were required under such chapter 43.

(B) Nondiscrimination requirement. Subparagraph (A) shall apply only if all individuals performing qualified military service with respect to the employer maintaining the plan (as determined under subsections (b), (c), (m), and (o)) who die or became disabled as a result of performing qualified military service prior to reemployment by the employer are credited with service and benefits on reasonably equivalent terms.

(C) Determination of benefits. The amount of employee contributions and the amount of elective deferrals of an individual treated as reemployed under subparagraph (A) for purposes of applying paragraph (8)(C) shall be determined on the basis of the individual's average actual employee contributions or elective deferrals for the lesser of--

(i) the 12-month period of service with the employer immediately prior to qualified military service, or

(ii) if service with the employer is less than such 12-month period, the actual length of continuous service with the employer.

(10) Plans not subject to title 38. This subsection shall not apply to any retirement plan to which chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], does not apply.

(11) References. For purposes of this section, any reference to chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], shall be treated as a reference to such chapter as in effect on December 12, 1994 (without regard to any subsequent amendment).

(12) Treatment of differential wage payments.

(A) In general. Except as provided in this paragraph, for purposes of applying this title to a retirement plan to which this subsection applies--

- (i) an individual receiving a differential wage payment shall be treated as an employee of the employer making the payment,
- (ii) the differential wage payment shall be treated as compensation, and
- (iii) the plan shall not be treated as failing to meet the requirements of any provision described in paragraph (1)(C) by reason of any contribution or benefit which is based on the differential wage payment.

(B) Special rule for distributions.

(i) In general. Notwithstanding subparagraph (A)(i), for purposes of section 401(k)(2)(B)(i)(I), 403(b)(7)(A)(ii), 403(b)(11)(A), or 457(d)(1)(A)(ii) [26 USCS § 401(k)(2)(B)(i)(I), 403(b)(7)(A)(ii), 403(b)(11)(A), or 457(d)(1)(A)(ii)], an individual shall be treated as having been severed from employment during any period the individual is performing service in the uniformed services described in section 3401(h)(2)(A) [26 USCS § 3401(h)(2)(A)].

(ii) Limitation. If an individual elects to receive a distribution by reason of clause (i), the plan shall provide that the individual may not make an elective deferral or employee contribution during the 6-month period beginning on the date of the distribution.

(C) Nondiscrimination requirement. Subparagraph (A)(iii) shall apply only if all employees of an employer (as determined under subsections (b), (c), (m), and (o)) performing service in the uniformed services described in section 3401(h)(2)(A) [26 USCS § 3401(h)(2)(A)] are entitled to receive differential wage payments on reasonably equivalent terms and, if eligible to participate in a retirement plan maintained by the employer, to make contributions based on the payments on reasonably equivalent terms. For purposes of applying this subparagraph, the provisions of paragraphs (3), (4), and (5) of section 410(b) [26 USCS § 410(b)] shall apply.

(D) Differential wage payment. For purposes of this paragraph, the term "differential wage payment" has the meaning given such term by section 3401(h)(2) [26 USCS § 3401(h)(2)].

(v) Catch-up contributions for individuals age 50 or over.

(1) In general. An applicable employer plan shall not be treated as failing to meet any requirement of this title solely because the plan permits an eligible participant to make additional elective deferrals in any plan year.

(2) Limitation on amount of additional deferrals.

(A) In general. A plan shall not permit additional elective deferrals under paragraph (1) for any year in an amount greater than the lesser of--

- (i) the applicable dollar amount, or
- (ii) the excess (if any) of--

(I) the participant's compensation (as defined in section 415(c)(3) [26 USCS § 415(c)(3)]) for the year, over

(II) any other elective deferrals of the participant for such year which are made without regard to this subsection.

(B) Applicable dollar amount. For purposes of this paragraph--

(i) In the case of an applicable employer plan other than a plan described in section 401(k)(11) or 408(p) [26 USCS § 401(k)(11) or 408(p)], the applicable dollar amount shall be determined in accordance with the following table:

For taxable years beginning in:	the applicable dollar amount is:
2002	\$ 1,000
2003	\$ 2,000
2004	\$ 3,000
2005	\$ 4,000
2006 or thereafter	\$ 5,000.

(ii) In the case of an applicable employer plan described in section 401(k)(11) or 408(p) [26 USCS § 401(k)(11) or 408(p)], the applicable dollar amount shall be determined in accordance with the following table:

For taxable years beginning in:	the applicable dollar amount is:
2002	\$ 500
2003	\$ 1,000
2004	\$ 1,500
2005	\$ 2,000
2006 or thereafter	\$ 2,500.

(C) Cost-of-living adjustment. In the case of a year beginning after December 31, 2006, the Secretary shall adjust annually the \$ 5,000 amount in subparagraph (B)(i) and the \$ 2,500 amount in subparagraph (B)(ii) for increases in the cost-of-living at the same time and in the same manner as adjustments under section 415(d) [26 USCS § 415(d)]; except that the base period taken into account shall be the calendar quarter beginning July 1, 2005, and any increase under this subparagraph which is not a multiple of \$ 500 shall be rounded to the next lower multiple of \$ 500.

(D) Aggregation of plans. For purposes of this paragraph, plans described in clauses (i), (ii), and (iv) of paragraph (6)(A) that are maintained by the same employer (as determined under subsection (b), (c), (m) or (o)) shall be treated as a single plan, and plans described in clause (iii) of paragraph (6)(A) that are maintained by the same employer shall be treated as a single plan.

(3) Treatment of contributions. In the case of any contribution to a plan under paragraph (1)--

(A) such contribution shall not, with respect to the year in which the contribution is made--

(i) be subject to any otherwise applicable limitation contained in sections 401(a)(30), 402(h), 403(b), 408, 415(c), and 457(b)(2) [26 USCS §§ 401(a)(30), 402(h), 403(b), 408, 415(c), and 457(b)(2)] (determined without regard to section 457(b)(3) [26 USCS § 457(b)(3)]), or

(ii) be taken into account in applying such limitations to other contributions or benefits under such plan or any other such plan, and

(B) except as provided in paragraph (4), such plan shall not be treated as failing to meet the requirements of section 401(a)(4), 401(k)(3), 401(k)(11), 403(b)(12), 408(k), 410(b), or 416 [26 USCS § 401(a)(4), 401(k)(3), 401(k)(11), 403(b)(12), 408(k), 410(b), or 416] by reason of the making of (or the right to make) such contribution.

(4) Application of nondiscrimination rules.

(A) In general. An applicable employer plan shall be treated as failing to meet the nondiscrimination requirements under section 401(a)(4) [26 USCS § 401(a)(4)] with respect to benefits, rights, and features unless the plan allows all eligible participants to make the same election with respect to the additional elective deferrals under this subsection.

(B) Aggregation. For purposes of subparagraph (A), all plans maintained by employers who are treated as a single employer under subsection (b), (c), (m), or (o) of section 414 [26 USCS § 414] shall be treated as 1 plan, except that a plan described in clause (i) of section 410(b)(6)(C) [26 USCS § 410(b)(6)(C)] shall not be treated as a plan of the employer until the expiration of the transition period with respect to such plan (as determined under clause (ii) of such section).

(5) Eligible participant. For purposes of this subsection, the term 'eligible participant' means a participant in a plan--

(A) who would attain age 50 by the end of the taxable year,

(B) with respect to whom no other elective deferrals may (without regard to this subsection) be made to the plan for the plan (or other applicable) year by reason of the application of any limitation or other restriction described in paragraph (3) or comparable limitation or restriction contained in the terms of the plan.

(6) Other definitions and rules. For purposes of this subsection--

(A) Applicable employer plan. The term "applicable employer plan" means--

(i) an employees' trust described in section 401(a) [26 USCS § 401(a)] which is exempt from tax under section 501(a) [26 USCS § 501(a)],

(ii) a plan under which amounts are contributed by an individual's employer for an annuity contract described in section 403(b) [26 USCS § 403(b)],

(iii) an eligible deferred compensation plan under section 457 [26 USCS § 457] of an eligible employer described in section 457(e)(1)(A) [26 USCS § 457(e)(1)(A)], and

(iv) an arrangement meeting the requirements of section 408 (k) or (p) [26 USCS § 408(k) or (p)].

(B) Elective deferral. The term "elective deferral" has the meaning given such term by subsection (u)(2)(C).

(C) Exception for section 457 [26 USCS § 457] plans. This subsection shall not apply to a participant for any year for which a higher limitation applies to the participant under section 457(b)(3) [26 USCS § 457(b)(3)].

(w) Special rules for certain withdrawals from eligible automatic contribution arrangements.

(1) In general. If an eligible automatic contribution arrangement allows an employee to elect to make permissible withdrawals--

(A) the amount of any such withdrawal shall be includible in the gross income of the employee for the taxable year of the employee in which the distribution is made,

(B) no tax shall be imposed under section 72(t) [26 USCS § 72(t)] with respect to the

distribution, and

(C) the arrangement shall not be treated as violating any restriction on distributions under this title solely by reason of allowing the withdrawal.

In the case of any distribution to an employee by reason of an election under this paragraph, employer matching contributions shall be forfeited or subject to such other treatment as the Secretary may prescribe.

(2) Permissible withdrawal. For purposes of this subsection--

(A) In general. The term "permissible withdrawal" means any withdrawal from an eligible automatic contribution arrangement meeting the requirements of this paragraph which--

(i) is made pursuant to an election by an employee, and

(ii) consists of elective contributions described in paragraph (3)(B) (and earnings attributable thereto).

(B) Time for making election. Subparagraph (A) shall not apply to an election by an employee unless the election is made no later than the date which is 90 days after the date of the first elective contribution with respect to the employee under the arrangement.

(C) Amount of distribution. Subparagraph (A) shall not apply to any election by an employee unless the amount of any distribution by reason of the election is equal to the amount of elective contributions made with respect to the first payroll period to which the eligible automatic contribution arrangement applies to the employee and any succeeding payroll period beginning before the effective date of the election (and earnings attributable thereto).

(3) Eligible automatic contribution arrangement. For purposes of this subsection, the term "eligible automatic contribution arrangement" means an arrangement under an applicable employer plan--

(A) under which a participant may elect to have the employer make payments as contributions under the plan on behalf of the participant, or to the participant directly in cash,

(B) under which the participant is treated as having elected to have the employer make such contributions in an amount equal to a uniform percentage of compensation provided under the plan until the participant specifically elects not to have such contributions made (or specifically elects to have such contributions made at a different percentage), and

(C) which meets the requirements of paragraph (4).

(D) [Redesignated]

(4) Notice requirements.

(A) In general. The administrator of a plan containing an arrangement described in paragraph (3) shall, within a reasonable period before each plan year, give to each employee to whom an arrangement described in paragraph (3) applies for such plan year notice of the employee's rights and obligations under the arrangement which--

(i) is sufficiently accurate and comprehensive to apprise the employee of such rights and obligations, and

(ii) is written in a manner calculated to be understood by the average employee to whom the arrangement applies.

(B) Time and form of notice. A notice shall not be treated as meeting the requirements of subparagraph (A) with respect to an employee unless--

(i) the notice includes an explanation of the employee's right under the arrangement to elect not to have elective contributions made on the employee's behalf (or to elect to have such contributions made at a different percentage),

(ii) the employee has a reasonable period of time after receipt of the notice described in clause (i) and before the first elective contribution is made to make such election, and

(iii) the notice explains how contributions made under the arrangement will be invested in the absence of any investment election by the employee.

(5) Applicable employer plan. For purposes of this subsection, the term "applicable employer plan" means--

(A) an employees' trust described in section 401(a) [26 USCS § 401(a)] which is exempt from tax under section 501(a) [26 USCS § 501(a)],

(B) a plan under which amounts are contributed by an individual's employer for an annuity contract described in section 403(b) [26 USCS § 403(b)],

(C) an eligible deferred compensation plan described in section 457(b) [26 USCS § 457(b)] which is maintained by an eligible employer described in section 457(e)(1)(A) [26 USCS § 457(e)(1)(A)],

(D) a simplified employee pension the terms of which provide for a salary reduction arrangement described in section 408(k)(6) [26 USCS § 408(k)(6)], and

(E) a simple retirement account (as defined in section 408(p) [26 USCS § 408(p)]).

(6) Special rule. A withdrawal described in paragraph (1) (subject to the limitation of paragraph (2)(C)) shall not be taken into account for purposes of section 401(k)(3) [26 USCS § 401(k)(3)] or for purposes of applying the limitation under section 402(g)(1) [26 USCS § 402(g)(1)].

(x) Special rules for eligible combined defined benefit plans and qualified cash or deferred arrangements

(1) General rule. Except as provided in this subsection, the requirements of this title shall be applied to any defined benefit plan or applicable defined contribution plan which are part of an eligible combined plan in the same manner as if each such plan were not a part of the eligible combined plan. In the case of a termination of the defined benefit plan and the applicable defined contribution plan forming part of an eligible combined plan, the plan administrator shall terminate each such plan separately.

(2) Eligible combined plan. For purposes of this subsection--

(A) In general. The term "eligible combined plan" means a plan--

(i) which is maintained by an employer which, at the time the plan is established, is a small employer,

(ii) which consists of a defined benefit plan and an applicable defined contribution plan,

(iii) the assets of which are held in a single trust forming part of the plan and are clearly identified and allocated to the defined benefit plan and the applicable defined contribution plan to the extent necessary for the separate application of this title under paragraph (1), and

(iv) with respect to which the benefit, contribution, vesting, and nondiscrimination requirements of subparagraphs (B), (C), (D), (E), and (F) are met.

For purposes of this subparagraph, the term "small employer" has the meaning given

such term by section 4980D(d)(2) [26 USCS § 4980D(d)(2)], except that such section shall be applied by substituting "500" for "50" each place it appears.

(B) Benefit requirements.

(i) In general. The benefit requirements of this subparagraph are met with respect to the defined benefit plan forming part of the eligible combined plan if the accrued benefit of each participant derived from employer contributions, when expressed as an annual retirement benefit, is not less than the applicable percentage of the participant's final average pay. For purposes of this clause, final average pay shall be determined using the period of consecutive years (not exceeding 5) during which the participant had the greatest aggregate compensation from the employer.

(ii) Applicable percentage. For purposes of clause (i), the applicable percentage is the lesser of--

- (I) 1 percent multiplied by the number of years of service with the employer, or
- (II) 20 percent.

(iii) Special rule for applicable defined benefit plans. If the defined benefit plan under clause (i) is an applicable defined benefit plan as defined in section 411(a)(13)(B) [26 USCS § 411(a)(13)(B)] which meets the interest credit requirements of section 411(b)(5)(B)(i) [26 USCS § 411(b)(5)(B)(i)], the plan shall be treated as meeting the requirements of clause (i) with respect to any plan year if each participant receives a pay credit for the year which is not less than the percentage of compensation determined in accordance with the following table:

If the participant's age as of the beginning of the year is--	The percentage is--
30 or less	2
Over 30 but less than 40	4
40 or over but less than 50	6
50 or over	8.

(iv) Years of service. For purposes of this subparagraph, years of service shall be determined under the rules of paragraphs (4), (5), and (6) of section 411(a) [26 USCS § 411(a)], except that the plan may not disregard any year of service because of a participant making, or failing to make, any elective deferral with respect to the qualified cash or deferred arrangement to which subparagraph (C) applies.

(C) Contribution requirements.

(i) In general. The contribution requirements of this subparagraph with respect to any applicable defined contribution plan forming part of an eligible combined plan are met if--

(I) the qualified cash or deferred arrangement included in such plan constitutes an automatic contribution arrangement, and

(II) the employer is required to make matching contributions on behalf of each employee eligible to participate in the arrangement in an amount equal to 50 percent of the elective contributions of the employee to the extent such elective contributions do not exceed 4 percent of compensation. Rules similar to the rules of clauses (ii) and (iii) of section 401(k)(12)(B) [26 USCS § 401(k)(12)(B)] shall apply for purposes of this clause.

(ii) Nonelective contributions. An applicable defined contribution plan shall not be treated as failing to meet the requirements of clause (i) because the employer makes nonelective contributions under the plan but such contributions shall not be taken into account in determining whether the requirements of clause (i)(II) are met.

(D) Vesting requirements. The vesting requirements of this subparagraph are met if--

(i) in the case of a defined benefit plan forming part of an eligible combined plan an employee who has completed at least 3 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit under the plan derived from employer contributions, and

(ii) in the case of an applicable defined contribution plan forming part of eligible combined plan--

(I) an employee has a nonforfeitable right to any matching contribution made under the qualified cash or deferred arrangement included in such plan by an employer with respect to any elective contribution, including matching contributions in excess of the contributions required under subparagraph (C)(i)(II), and

(II) an employee who has completed at least 3 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived under the arrangement from nonelective contributions of the employer. For purposes of this subparagraph, the rules of section 411 shall apply to the extent not inconsistent with this subparagraph.

(E) Uniform provision of contributions and benefits. In the case of a defined benefit plan or applicable defined contribution plan forming part of an eligible combined plan, the requirements of this subparagraph are met if all contributions and benefits under each such plan, and all rights and features under each such plan, must be provided uniformly to all participants.

(F) Requirements must be met without taking into account social security and similar contributions and benefits or other plans.

(i) In general. The requirements of this subparagraph are met if the requirements of clauses (ii) and (iii) are met.

(ii) Social security and similar contributions. The requirements of this clause are met if--

(I) the requirements of subparagraphs (B) and (C) are met without regard to section 401(l) [26 USCS § 401(l)], and

(II) the requirements of sections 401(a)(4) and 410(b) [26 USCS §§ 401(a)(4) and 410(b)] are met with respect to both the applicable defined contribution plan and defined benefit plan forming part of an eligible combined plan without regard to section 401(l) [26 USCS § 401(l)].

(iii) Other plans and arrangements. The requirements of this clause are met if the applicable defined contribution plan and defined benefit plan forming part of an eligible combined plan meet the requirements of sections 401(a)(4) and 410(b) [26 USCS §§ 401(a)(4) and 410(b)] without being combined with any other plan.

(3) Nondiscrimination requirements for qualified cash or deferred arrangement.

(A) In general. A qualified cash or deferred arrangement which is included in an applicable defined contribution plan forming part of an eligible combined plan shall be treated as meeting the requirements of section 401(k)(3)(A)(ii) [26 USCS § 401(k)(3)(A)(ii)] if the requirements of paragraph (2)(C) are met with respect to such

arrangement.

(B) Matching contributions. In applying section 401(m)(11) [26 USCS § 401(m)(11)] to any matching contribution with respect to a contribution to which paragraph (2)(C) applies, the contribution requirement of paragraph (2)(C) and the notice requirements of paragraph (5)(B) shall be substituted for the requirements otherwise applicable under clauses (i) and (ii) of section 401(m)(11)(A) [26 USCS § 401(m)(11)(A)].

(4) Satisfaction of top-heavy rules. A defined benefit plan and applicable defined contribution plan forming part of an eligible combined plan for any plan year shall be treated as meeting the requirements of section 416 [26 USCS § 416] for the plan year.

(5) Automatic contribution arrangement. For purposes of this subsection--

(A) In general. A qualified cash or deferred arrangement shall be treated as an automatic contribution arrangement if the arrangement--

(i) provides that each employee eligible to participate in the arrangement is treated as having elected to have the employer make elective contributions in an amount equal to 4 percent of the employee's compensation unless the employee specifically elects not to have such contributions made or to have such contributions made at a different rate, and

(ii) meets the notice requirements under subparagraph (B).

(B) Notice requirements.

(i) In general. The requirements of this subparagraph are met if the requirements of clauses (ii) and (iii) are met.

(ii) Reasonable period to make election. The requirements of this clause are met if each employee to whom subparagraph (A)(i) applies--

(I) receives a notice explaining the employee's right under the arrangement to elect not to have elective contributions made on the employee's behalf or to have the contributions made at a different rate, and

(II) has a reasonable period of time after receipt of such notice and before the first elective contribution is made to make such election.

(iii) Annual notice of rights and obligations. The requirements of this clause are met if each employee eligible to participate in the arrangement is, within a reasonable period before any year, given notice of the employee's rights and obligations under the arrangement.

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) [26 USCS § 401(k)(12)(D)] shall be met with respect to the notices described in clauses (ii) and (iii) of this subparagraph.

(6) Coordination with other requirements.

(A) Treatment of separate plans. Section 414(k) [26 USCS § 414(k)] shall not apply to an eligible combined plan.

(B) Reporting. An eligible combined plan shall be treated as a single plan for purposes of sections 6058 and 6059 [26 USCS §§ 6058 and 6059].

(7) Applicable defined contribution plan. For purposes of this subsection--

(A) In general. The term "applicable defined contribution plan" means a defined contribution plan which includes a qualified cash or deferred arrangement.

(B) Qualified cash or deferred arrangement. The term "qualified cash or deferred arrangement" has the meaning given such term by section 401(k)(2) [26 USCS § 401(k)(2)].

Ohio 6th Dist. Loc. App. R. 6 (2009)

Rule 6. Original actions

Habeas corpus actions shall be brought and proceed in accordance with R.C. Chapter 2725. Petitioner shall file an original and three copies of a complaint in habeas corpus.

An original action, other than habeas corpus, shall be instituted by filing an original and three copies of a complaint for the court's use, plus additional copies as necessary for service to each respondent. The complaint shall contain the name, title, and address of each respondent. The clerk of the court of appeals shall serve a copy of the complaint and summons upon each respondent by certified mail to the addresses(es) indicated on the complaint. The summons shall state that respondent need not file an answer until directed by the court of appeals to do so. If the complaint appears to properly set forth a claim for relief, the court will issue an alternative writ which will indicate the time for filing an answer or a motion to dismiss pursuant to Civ.R. 12(B)(6). Except as delineated below, the original action shall proceed as any civil action under the Ohio Rules of Civil Procedure, as may be applicable to original actions.

Unless otherwise directed by the court, in all original actions, other than in habeas corpus, if either party intends to file a motion for summary judgment, the motion shall be filed within 20 days of the date of service of the answer filed by respondent. A response to the motion for summary judgment shall be due within 20 days of the date of service of the motion and a reply shall be due within 10 days of the date of service of the response, at which time the motion will be decisional. No hearing will be held on a motion for summary judgment unless ordered by the court.

In the event that neither party files a motion for summary judgment or a motion to dismiss in the time allowed, or if a motion for summary judgment or a motion to dismiss is filed and denied, the parties shall submit their case to the court within 20 days of the date that the motion for summary judgment or motion to dismiss was due or is denied. Each party's case shall be submitted by a brief on the law, an agreed statement of facts, if applicable, and/or stipulations, depositions, and/or affidavits. No hearing will be held unless ordered by the court. If the court orders a hearing, court stenographers will not be in attendance unless arranged for and employed by one or more of the parties and appointed by the court, or unless, because of exceptional circumstances, otherwise ordered by the court.

Rule 75. Divorce, annulment, and legal separation actions

(J) Continuing jurisdiction.

The continuing jurisdiction of the court shall be invoked by motion filed in the original action, notice of which shall be served in the manner provided for the service of process under Civ. R. 4 to 4.6. When the continuing jurisdiction of the court is invoked pursuant to this division, the discovery procedures set forth in Civ. R. 26 to 37 shall apply.

Rule 62. Stay of proceedings to enforce a judgment

(A) Stay on motion for new trial or for judgment.

In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of any judgment or stay any proceedings to enforce judgment pending the disposition of a motion for a new trial, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment notwithstanding the verdict made pursuant to Rule 50.

(B) Stay upon appeal.

When an appeal is taken the appellant may obtain a stay of execution of a judgment or any proceedings to enforce a judgment by giving an adequate supersedeas bond. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

(C) Stay in favor of the government.

When an appeal is taken by this state or political subdivision, or administrative agency of either, or by any officer thereof acting in his representative capacity and the operation or enforcement of the judgment is stayed, no bond, obligation or other security shall be required from the appellant.

(D) Power of appellate court not limited.

The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(E) Stay of judgment as to multiple claims or multiple parties.

When a court has ordered a final judgment under the conditions stated in Rule 54(B), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

§ 2505.09. Appeal as stay of execution; supersedeas bond

Except as provided in section 2505.11 or 2505.12 or another section of the Revised Code or in applicable rules governing courts, an appeal does not operate as a stay of execution until a stay of execution has been obtained pursuant to the Rules of Appellate Procedure or in another applicable manner, and a supersedeas bond is executed by the appellant to the appellee, with sufficient sureties and in a sum that is not less than, if applicable, the cumulative total for all claims covered by the final order, judgment, or decree and interest involved, except that the bond shall not exceed fifty million dollars excluding interest and costs, as directed by the court that rendered the final order, judgment, or decree that is sought to be superseded or by the court to which the appeal is taken. That bond shall be conditioned as provided in section 2505.14 of the Revised Code.

Rule 3. Appeal as of right—how taken

(A) Filing the notice of appeal.

An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by leave of court shall be taken in the manner prescribed by Rule 5.

(B) Joint or consolidated appeals.

If two or more persons are entitled to appeal from a judgment or order of a trial court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(C) Cross appeal.

(1) Cross appeal required. A person who intends to defend a judgment or order against an appeal taken by an appellant and who also seeks to change the judgment or order or, in the event the judgment or order may be reversed or modified, an interlocutory ruling merged into the judgment or order, shall file a notice of cross appeal within the time allowed by App.R. 4.

(2) Cross appeal not required. A person who intends to defend a judgment or order appealed by an appellant on a ground other than that relied on by the trial court but who does not seek to change the judgment or order is not required to file a notice of cross appeal.

(D) Content of the notice of appeal.

The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. The title of the case shall be the same as in the trial court with the designation of the appellant added, as appropriate. Form 1 in Appendix of Forms is a suggested form of a notice of appeal.

(E) Service of the notice of appeal.

The clerk of the trial court shall serve notice of the filing of a notice of appeal and, where

required by local rule, a docketing statement, by mailing, or by facsimile transmission, a copy to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at the party's last known address. The clerk shall mail or otherwise forward a copy of the notice of appeal and of the docket entries, together with a copy of all filings by appellant pursuant to App.R. 9(B), to the clerk of the court of appeals named in the notice. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or a party's counsel. The clerk shall note in the docket the names of the parties served, the date served, and the means of service.

(F) Amendment of the notice of appeal.

The court of appeals within its discretion and upon such terms as are just may allow the amendment of a timely filed notice of appeal.

(G) Docketing statement.

If a court of appeals has adopted an accelerated calendar by local rule pursuant to Rule 11.1, a docketing statement shall be filed with the clerk of the trial court with the notice of appeal. (See Form 2, Appendix of Forms.)

The purpose of the docketing statement is to determine whether an appeal will be assigned to the accelerated or the regular calendar.

A case may be assigned to the accelerated calendar if any of the following apply:

- (1) No transcript is required (e.g. summary judgment or judgment on the pleadings);
- (2) The length of the transcript is such that its preparation time will not be a source of delay;
- (3) An agreed statement is submitted in lieu of the record;
- (4) The record was made in an administrative hearing and filed with the trial court;
- (5) All parties to the appeal approve an assignment of the appeal to the accelerated calendar; or
- (6) The case has been designated by local rule for the accelerated calendar.

The court of appeals by local rule may assign a case to the accelerated calendar at any stage of the proceeding. The court of appeals may provide by local rule for an oral hearing before a full panel in order to assist it in determining whether the appeal should be assigned to the accelerated calendar.

Upon motion of appellant or appellee for a procedural order pursuant to App.R. 15(B) filed within seven days after the notice of appeal is filed with the clerk of the trial court, a case may be removed for good cause from the accelerated calendar and assigned to the regular calendar. Demonstration of a unique issue of law which will be of substantial precedential value in the determination of similar cases will ordinarily be good cause for transfer to the regular calendar.