

QUALIFIED DOMESTIC RELATIONS ORDERS

Legislative Fact Sheet

Problem:

Tribal Court Domestic Relations orders cannot divided tax-exempt retirement plans established pursuant to 26 USC §401, et seq. As a result, tribal members obtaining a divorce through their tribal court, often the only forum jurisdictionally available to them, are unable to get an equitable division of their retirement plans, an often sizable community asset. Non-members married to tribal members may also be unable to obtain a division of their retirement plans. Instead, persons divorced in tribal court may be required to cash in their plans and lose the tax benefits of keeping the plan until retirement.

26 USC §414(p), defines Qualified Domestic Relations Orders (QUADROS), and authorizes State courts to enter QUADROS to divide retirement benefits, most commonly, in divorces.

26 USC §414(p)(B)(ii), is very clear in confining such orders to orders “made pursuant to a State domestic relations law.”

26 USC §7871, which sets out limited situations where an Indian tribal government can be treated as a State, does not include a reference to the QUADROS authorization statutes.

Solution:

A Mend 26 USC §414(p)(I)(B)(ii) to read “is made pursuant to a State or tribal domestic relations law (including a community property law).” (proposed amendment is underlined).

Justification:

26 USC §414 in its present form excludes tribal courts from dividing tax-exempt retirement plans in a dissolution of marriage proceeding to create a separate account for each party.

Under Whyte v. District Court, 140 Colo. 334, 346 P.2d 1012 (1959) cert. denied 363 U.S. 829 (1960), and DeCoteau v. District County Court, 420 U.S. 425 (1975), tribal courts have exclusive jurisdiction over divorces of on-reservation tribal members. In situations where a tribal member residing on reservation is employed by a company which provides tax-exempt retirement plans, those plans cannot be divided by the tribal court, the only court that can grant the divorce.

Private employers such as the Navajo Generating Station near Page, Arizona and the Peabody Coal Mines near Kayenta, Arizona provide such plans, are located within or near Indian nations and employ substantial numbers of tribal members and spouses of members. These employers are prohibited from dividing retirement plan in the event of a divorce except as permitted by federal law.

These retirement plans are often the largest single asset acquired during a marriage. The inability of tribal courts to cause a division of these plans is potentially costly and unfair to the parties.