"SHAM DIVORCES," CIVIL RIGHTS, AND FAMILY LAW EXPERTS

I recently participated as the expert witness for a number of airline pilots in a series of arbitrations. The pilots had been fired by their employers for entering into supposedly "sham divorces" with their spouses for the purposes of accessing the pilots' pension benefits by QDRO.

Simultaneously, a federal district court in Texas ruled in favor of other pilots in parallel cases in *Brown v. Continental Airlines*.[1]

In both groups of cases, the employers came to believe that the pilots had obtained divorces for the specific purpose of withdrawing their pensions "early." As the federal court recited, "the pilots and their former spouses did not behave in a manner consistent with the breakup of a marriage. Many of the pilots continued to cohabitate, remarried soon after obtaining the lump sum payout, and all essentially conducted themselves as if the divorce had never happened."

Under ERISA, plan administrators may review DROs (Domestic Relations Orders) to determine if they "qualify" as QDROs (Qualified Domestic Relations Orders), defined by ERISA as orders which assigns an alternate payee the right to, receive "all or a portion of the benefits payable with respect to a participant under a plan," and comport with special terms defining the specificity of information regarding the alternate payee, and whether the DRO would allow benefits not available under the plan or in conflict with another alternate payee respectively.[2]

ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.[3] Normally, this means that pension rights are "inalienable" – non-transferable to third parties, so as to safeguard a stream of income for pensioners ... and their dependants.[4]

But in 1984, Congress enacted the Retirement Equity Act (REA) amending ERISA and adding, among other things, an exception to the anti-alienation provision for a domestic relations order resulting from a divorce between an employee and a non-participating spouse.[5]

In the airline cases, however, the plans wanted to go beyond the technical requirements of ERISA, and deem the underlying divorce decrees obtained by the pilots and their spouses "shams," thus permitting them to ignore the DROs and refuse to qualify them as QDROs (and thus not paying out the pension benefits).

While the federal judge in *Brown* fell back on not looking beyond the technical requirements of ERISA, the airline pilots in the arbitrations took the fight to the airlines on domestic relations public policy grounds.

Folks arrange their marital status for maximum financial advantage, on the advice of lawyers, all the time – for tax status, loan and mortgage qualification, and a host of other reasons that are affected by marital status.

In the modern "no-fault" world, the sole determination of marriage is a present intent at a given

moment to ***be*** married. One is not required to hate one's ex, or not to associate, live with, date, or re-marry one's ex. I see all of those actions all the time – and usually for non-economic reasons.[6] But the motivation for marriage – or divorce – is irrelevant; it's perfectly lawful, and if a divorce maximizes the size of the marital estate, it sounds like responsible financial planning.

The 1999 Department of Labor guidance stated "the administrator may not independently determine that the order is not valid under State law and therefore is not a 'domestic relations order' under section 206(d)(3)(C), but should rather proceed with the determination of whether the order is a QDRO." That was a good call, and the only appropriate response.

A man and a woman (in most states; other combinations in others) who wish to adopt the legal relationship of "married" are free to do so at will, and to dissolve their union, at will, for their individual or joint advantage as they see it, including any financial advantages they see or think they see. It is just not an airline's business to inquire behind the decision to marry, or to divorce – and even less so is it the business of their Pension Plan Administrators.

In fact, in many States, both parties to a marriage have been found to have a fiduciary duty to look out for the maximum financial welfare of the community. The core holding of *Luciano*,[7] a California case adopted by the Nevada Supreme Court in *Gemma*,[8] was that "The employee spouse cannot by election defeat the nonemployee spouse's interest in the community property by relying on a condition within the employee spouse's control." It's not much of a stretch from there to a duty – or at minimum, legal protection – to arrange marital status in such a way as to maximize the community income and assets.

So long as marital union, and marital dissolution, are legally available, the motivations of the parties are irrelevant to anyone else. The Plan, and Plan Administrator, and attorneys for both, just have no business interjecting themselves into private lives or making ***any*** kind of moral judgment about plan participants, dependents, or beneficiaries, or the "correctness" of legal proceedings in domestic relations courts. They are to obey conforming documents – period.

This was the essence of my testimony in the arbitrations. The defense corporate attorney-types representing the airlines were – quite literally – speechless.

But all of this is pretty basic civil rights stuff, and the employer who chooses to render judgment that an employee has entered into a "sham" divorce "just to get more pension money" may reasonably expect to pay – a lot – at the end of the appellate road.

These cases illustrate the value that a family law specialist expert witness might bring to litigation involving matters that appear far afield from the divorce courts. As the pilots' lead attorney wrote me when the cases ended: "It has been a pleasure working with you on these cases. I have gained an appreciation for domestic relations and pension law and DR lawyers . . . which I did not have before these cases began. The way issues in this area of law scratch their way into the very basic fabric of our freedoms is fascinating."

Gave me a warm feeling – it's nice to be able to do a good turn for the little guy facing a big

corporation that wants to take his livelihood, or assets – and make the case a winner. And these cases provide a nice reminder that family law touches every conceivable field, often as the determiner of how things do – and should – come out for everyone involved.

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1. Docket H-9-1148, H-9-1529, 47 EBC 2704, 2009 WL 3365911 (S.D. Tex., Oct. 19, 2009).

2. 29 U.S.C. § 1056(d)(3)(B)(i).

3. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S. Ct. 2890 (1983).

4. *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376, 110 S. Ct. 680 (1990).

5. *See* Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426.

6. My personal record is divorcing the same fellow from the same woman four times, bringing to mind the old joke about the lawyer saying goodbye to his client at the courthouse, and saying: "Goodbye, John, and I sure hope this divorce last longer than your last one."

7. *In re Marriage of Luciano*, 164 Cal. Rptr. 93 (Ct. App. 1980).

8. *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989).