ERISA AND QDROS: SOME CURRENT ISSUES AND CONCERNS

by

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June 27, 2009

BIOGRAPHY

Mr. Willick is the principal of the Willick Law Group, an A/V rated Family Law firm in Las Vegas, Nevada, and practices in trial and appellate Family Law. He is a Certified Family Law Specialist, a Fellow of both the American and International Academies of Matrimonial Lawyers, former Chair of the Nevada Bar Family Law Section and past President of the Nevada chapter of the AAML. He has authored several books and articles on Family Law and retirement benefits issues, and was managing editor of the Nevada Family Law Practice Manual.

In addition to litigating trial and appellate cases in Nevada, Mr. Willick has participated in hundreds of divorce and pension cases in the trial and appellate courts of other States, and in the drafting of various State and federal statutes in the areas of pensions, divorce, and property division. He has chaired several Committees of the American Bar Association Family Law Section, and has repeatedly represented the entire ABA in Congressional hearings on military pension matters. He has served on many committees, boards, and commissions of the ABA, AAML, and Nevada Bar, has served as an alternate judge in various courts, and is called upon to testify from time to time as an expert witness. He serves on the Board of Directors for the Legal Aid Center of Southern Nevada.

Mr. Willick received his B.A. from the University of Nevada at Las Vegas in 1979, with honors, and his J.D. from Georgetown University Law Center in Washington, D.C., in 1982. Before entering private practice, he served on the Central Legal Staff of the Nevada Supreme Court for two years.

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TABLE OF CONTENTS

I. STATUTORY CHANGES

The Pension Protection Act of 2006 requires the Secretary of Labor to issue regulations under ERISA § 206(d)(3) and Internal Revenue Code § 414(p) clarifying that:

> (1) a DRO otherwise meeting the requirements to be a QDRO will not fail to be treated as a QDRO solely because
>
> (a) the order is issued after, or revises, another order, or
>
> (b) of the time at which it is issued; and
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> (2) any order described in paragraph (1) will be subject to the same requirements and protections which apply to QDROs, including the provisions of ERISA § 206(d)(3)(H)[section 1056(d)], and Internal Revenue Code § 414(p)(7).

The referenced Code sections govern survivorship benefits payable to spouses or former spouses. In plain English, the statutory clarification would appear to state that the *Torres*[1] court had it perfectly right – a State court may issue a QDRO after the retirement of the member, altering the designation of the named survivor beneficiary.

The United States Department of Labor guidebook says the same thing – a QDRO changing the survivor beneficiary can be entered at any time.[2] As detailed below, however, some courts are not following what seems to be a clear direction.

Instead, some courts appear to believe that only the spouse married to a participant at the moment of retirement can be considered a "surviving spouse," citing *Hopkins*,[3] which in turn relied upon 29 U.S.C. § 1055(f).[4]

The statutory provision is problematic; a pension plan ***might*** choose to enact that ***optional*** term, and thus limit "surviving spouse" status to the person that just happened to be married to a participant at the moment of retirement.[5] But it is being "over-read" into some kind of policy requirement.

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[1] *Torres v. Torres*, 60 P.3d 798 (Haw. 2003).

[2] *See* PENSION AND WELFARE BENEFITS ADMINISTRATION, U.S. DEPARTMENT OF LABOR, QDROS: THE DIVISION OF PENSIONS THROUGH QUALIFIED DOMESTIC RELATIONS ORDERS (2001) at 20-21(stating that the procedures set forth in section 414(p)(7) of the Code apply to an "order received on or after the date on which benefits would be payable"). Even when a QDRO would be rendered ineffective – such as when a participant's account is fully distributed and there is nothing left in an account no longer accruing benefits – the statutes do not indicate that *the right to obtain* a QDRO has expired.

[3] *Hopkins v. AT & T Global Information Solutions Co.*, 105 F.3d 153 (4th Cir. 1997).

[4] *See* OB at 13.

[5] ICR 75 at 6.

II. *KENNEDY*: SOME ANSWERS AND NEW DANGERS

A. Case Summary

Kennedy v. Plan Administrator for Dupont Savings and Investment Plan,
2009 WL 160440 (Jan. 26, 2009)

The U.S. Supreme Court has made the lives of plan administrators easier, made the lives of divorce lawyers harder, and resolved a couple of questions while leaving others enormously unsettled and uncertain.

The unanimous Court held that an ex-wife's waiver of any rights under her husband's savings and investment plan (SIP) in a divorce decree that was not a QDRO did not control over her ex-husband's designation of her as his beneficiary in accordance with the terms and forms of the SIP, at least as to how the plan should make out checks, if not as to who should ultimately get the money.

The Courts of Appeals and State Supreme Courts have been split for some years as to whether to recognize waivers by spouses of pension plan benefits in divorce decrees, where (as is usually the case) the decrees do not qualify as QDROs. Not unexpectedly, the Court permitted the convenience of plan administrators to trump any need to do equity, and held that when a plan has rules, procedures, and forms through which a participant may alter a beneficiary designation, the plan documents control over any attempted waiver of any interest in the pension plan by an ex-spouse in a divorce decree.

William Kennedy participated in his employer's defined contribution savings and investment plan (SIP). In 1971, William married Liv, and in 1974 he signed a form designating her as the survivor beneficiary under the plan, without naming a contingent beneficiary to take benefits if she disclaimed her interest. The plan in question permitted a participant to both designate a survivor beneficiary, and to replace or revoke that designation. The plan required "all authorizations, designations and requests concerning the Plan to be made by employees in the manner prescribed by the plan administrator," and provided the requisite forms. The plan also provided that if there was no surviving spouse or designated beneficiary upon death, the benefits would be directed by the estate's executor or administrator.

William and Liv divorced in 1994. Their divorce decree divested Liv of her interest in the SIP. For reasons never explained, however, William did not execute the form removing Liv as the SIP beneficiary. He ***did*** change the beneficiary designation for his pension plan, naming his daughter as beneficiary, but he never altered the beneficiary under the SIP.

William died in 2001. The plan administrator relied on William's designation form and paid the benefits to Liv. The Estate sued, alleging that Liv had waived her pension plan benefits in the divorce and that the plan had thus violated ERISA by distributing the benefits to her.

The District Court entered summary judgment for the Estate, ordering the plan to pay the benefits to the Estate. However, the Fifth Circuit reversed, holding that Liv's divorce-decree waiver was an "assignment or alienation" of her interest to the Estate, which was barred by ERISA. The Estate appealed.

The Supreme Court found that the divorce decree waiver was ***not*** a prohibited "assignment or alienation," but ultimately affirmed the Fifth Circuit decision anyway.

Specifically, the Court found that the divorce decree waiver did not violate ERISA's anti-alienation or anti-assignment clauses. It also rejected the oft-recited "distinction" between "welfare plans" and "pension plans," and held that a simple waiver by a spouse of survivor benefits does not satisfy the definition of either an "assignment" or a "transfer," and thus is not barred by the antialienation provision of ERISA, or otherwise. The Court reasoned that, therefore, a waiver could be effective even though it does not satisfy the requirements to be a QDRO.

In this case, however, the Court found that the plan documents explicitly provided that the plan would pay benefits to a participant's designated beneficiary, and included straight-forward forms and procedures for any changes in the designation of the named beneficiary. William's designation of Liv as his beneficiary was made in the way required; Liv's waiver was not. The Court decided that in those circumstances, plan administrators should not be forced "to examine a multitude of external documents that might purport to affect the dispensation of benefits," and be drawn into litigation over the meaning and enforceability of purported waivers.

The Court focused on "administrative ease," and held that where a plan participant has a clear set of instructions for manifesting his intent to name or change a beneficiary, ERISA does not allow the plan to go beyond those instructions, to foster "simple administration, avoiding double liability, and ensuring that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules."

Accordingly, the Court held that the plan could and should ignore Liv's divorce-decree waiver of the survivorship benefits, and "did its statutory ERISA duty by paying the benefits to Liv in conformity with the plan documents." The Court noted that a plan administrator is obliged to act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of ERISA, and the Act provides no exemption from this duty when it comes time to pay benefits."

But the Court left unresolved significant questions, noting that its decision "leaves open any questions about a waiver's effect in circumstances in which it is consistent with plan documents." Here, the waiver was not contemplated by the terms of the SIP and had no effect. But if the plan terms ***had*** allowed for a written waiver outside of the plan's specified forms and beneficiary change procedures, the waiver would apparently have been honored, although the scope and effect of such a permitted waiver was unspecified.

The Court explicitly refused to express any view as to whether the Estate could have brought an action in state or federal court against Liv to obtain the benefits after they were distributed, noting that various courts have distinguished the Court's prior holding in *Boggs v. Boggs*, 520 U.S. 833, 853 (1997), but not otherwise commenting on those cases.

The Court also "expressed no view regarding the ability of a participant or beneficiary to bring a cause of action under ERISA where the terms of the plan fail to conform to the requirements of ERISA and the party seeks to recover under the terms of the statute."

Some believe that the quoted language is notice that if the plan terms had not conformed to ERISA in some respect, suit against the plan by an intended beneficiary apparently would have been permitted. Others do not think that any conclusion can be drawn in an area in which the court "expressed no view."

The ultimate result was the declaration that even though the ex-wife's divorce decree waiver of her interest in her ex-husband's plan was "not rendered a nullity," the plan was still entitled to distribute to her the benefits designated on the beneficiary form, because the ex-husband took no steps to remove her as beneficiary or name a new beneficiary, as he was allowed and required to do under the terms of the SIP. Apparently, if the SIP had said that in the event of a divorce the designation of an ex-spouse was automatically nullified and the beneficiary was to be the participant's estate until a different beneficiary was named, that would have been the result.

B. Questions and Issues

1. Waiver issue

    a. Simplicity – so long as the plan has clear provisions, and forms, for waiver of a spousal interest, and for altering a beneficiary designation.

    b. Reserved question – whether to honor waiver where plan does NOT provide explicit mechanism for waiving an interest and altering a beneficiary designation.

    c. NOT ADDRESSED – how this holding applies in the context of a defined benefit, as opposed to defined contribution, plan, where the QJSA automatically applies at retirement, naming the spouse of the moment.

2. Implications for Divorce Lawyers

    a. "You can't always get what you want."

b. Required discovery as to whether a waiver is available.

c. The "M" word

3. Does waiver still make sense?

a. Yes, but a double-edged sword

(1) Usually a good idea to memorialize intent to ensure there is no dispute later as to what was intended.

(2) But additional duty to ensure that intent is carried into effect.

(3) Possibly unwaivable responsibility

b. Explicitness not really the issue. Here, no doubt as to waiver, but no effect.

c. Suggested language: suggest specific reference to both retirement and survivorship/death benefits.

d. Advice to Participant: Deal with all retirement benefits RIGHT NOW as part of divorce process (hard to get them to do so).

e. Advice to Spouse – well, it depends on what you want to occur.

f. Enforcement of waiver after payment if plan pays the "wrong" party –

(1) Maybe.

g. When does it make sense to join a plan/employer/administrator?

III. THE *CARMONA* CONUNDRUM: ARE ALL DIVORCE LAWYERS REQUIRED TO BE ERISA GURUS?

A. Recourse if plan will not change beneficiary by form or QDRO – the *Carmona* conundrum

B. Can a QDRO issued after retirement alter a survivor beneficiary?

C. Reserved question in 9th Circuit *Tise*[6] in 2000.

D. At least one court in this Circuit said "yes."[7]

E. Is this the meaning of the Congressional Enactment in the Pension Protection Act?

F. Panel's decision: upon retirement, survivorship benefits under ERISA "irrevocably vest" in the spouse that happened to be married to the participant at that moment, and could not be thereafter altered.

1. *Kennedy* refutes that assertion?

2. Plan rejection of QDRO "looking behind" the court order?

3. What if the plan documents provide no means for a beneficiary to renounce an interest in benefits?

a. *Matschiner v. Hartford*[8]: plan did not provide a method or provision by which the beneficiary named in the plan documents could disclaim his or her interest in the survivorship benefits.

b. The court therefore looked to the divorce decree between the parties, concluded that the named beneficiary had waived any interest in them, and directed that the benefits be paid to successor beneficiaries.

G. Pending rehearing

H. Implications if I lose as to duty of divorce attorney

IV. PROVISIONAL QDROS: A NEAT TRICK

California's provisional qdro: designed to be used with all judgments where a qdro has not yet been entered. It should work for both ERISA and government plans; whether defined benefit or defined contribution.

See descriptive article from Barbara DiFranza, attached below.

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[6] *Trs. Of the Dirs. Guild of Am.-Producer Pension Benefits Plans v. Tise*, 234 F.3d 415 (9th Cir. 2000).

[7] *Torres v. Torres*, 60 P.3d 798 (Haw. 2003).

[8] *Matschiner v. Hartford*, ___ N.W.2d ___ (D. Neb., 2009 U.S. Dist. LEXIS 11302, Feb. 13, 2009).

V. ODDS & ENDS

A. Include a clause in all divorce decrees or incorporated marital settlement agreements that allows nonemployee spouse and counsel to get directly from all companies/plans etc. information regarding any pension or retirement plan (qualified or nonqualified) which in any way was related to service rendered or contributions made during the marriage.

B. Reservations of jurisdiction (spouse's attorney)

1. Reservation of spousal support (alimony) jurisdiction

2. Alt. – conditional termination of support at pension start

WHAT TO DO AFTER THE DIVORCE UNTIL THE QDRO IS DONE

BY BARBARA A. DiFRANZA

It is not often that practitioners may take advantage of a one-size-fits-all solution to a nagging problem involving divorce: How to protect the nonemployee spouse who desires to complete his/her divorce before the domestic relations order or QDRO is completed. Here are suggested paragraphs for inclusion in the divorce decree:

> Each party (insert party names and addresses) is provisionally awarded without prejudice and subject to adjustment by subsequent domestic relations order, a separate interest equal to one-half of all benefits accrued or to be accrued under the plan [[it is important to name each plan individually]] as a result of employment of the other party during the marriage/domestic partnership and prior to the date of separation.
>
> In addition, pending further notice, the plan shall, as allowed by law or in the case of a governmental plan, as allowed by the terms of the plan, continue to treat the parties as married/domestic partners for purposes of survivor rights/benefits available under the plan to the extent necessary to provide for payment of an amount equal to that separate interest or for all of such survivor benefit if at the time of the death of the participant, there is no other eligible recipient of such survivor benefit.
>
> A copy of any order created under subsection d (2) above, including the Judgment of Status Dissolution, shall be promptly served by _____ on the Retirement or Pension Plan Administrator.

The foregoing suggested language and other provisions designed to help the family law practitioner in the area of pensions and survivor benefits were drafted by California attorney, R. Ann Fallon, and Texas/California attorney, James M. Crawford, Jr., as part of 2007 legislative changes to the California Family Code. Appropriate utilization of the suggested provisions may save many out-spouses from loss of benefits and the attendant spillover to actions against counsel.

The suggested provisions may be included in a Qualified Domestic Relations Order (QDRO) for ERISA plans and in a Court Order Acceptable for Processing (COAP) for federal civil service and railroad plans. They should serve to protect the nonemployee spouse's interest in most account balance plans, such as 401(k) plans, teachers' tax sheltered annuities, and the federal Thrift Savings Plan.

It must be noted, however, that in Nevada PERS at this time, the Participant may leave only a relatively small lump sum benefit if single and leave a survivor annuity to his/her new spouse if re-married. The former will likely be insufficient and the latter will

be difficult to reach, if at all. Thus in PERS cases, counsel for nonemployee spouses–especially those representing persons who have few other resources for their retirement years should also consider requesting continued coverage for the nonemployee under available life insurance in the interim period prior to retirement. In the process of completing the PERS QDRO, the attorney for the nonemployee spouse should engage in negotiations with opposing counsel to include a suitable amount of life insurance to protect the nonemployee spouse's retirement interest and/or spousal support needs. The following terms are suggested:

> Until further order of the court, [Employee] shall maintain [Nonemployee] as beneficiary of all employer-provided [and privately provided] life insurance policies, including but not limited to [list]. [Terms to insure payment of premiums, notice to nonemployee spouse of lapse with ability to correct, etc.]

Like that donut wheel on your new car, the proposed terminology discussed above may protect against most problems, but is no substitute for a carefully crafted QDRO or other domestic relations order which will provide the best protection for the community and the separate property interests of both parties.

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Barbara A. DiFranza joined the Nevada Bar in 2005, having specialized in the distribution of pension and deferred compensation benefits in California for more than 25 years. She is a Certified Family Law Specialist (California Board of Specialization) and a Fellow of the American Academy of Matrimonial Lawyers. Ms. DiFranza provides consultation, expert witness testimony, litigation support and drafting of domestic relations orders. She may be reached at: 5366 Ventana Parkway, Reno, NV 89511; Tel: (775) 852-2414; Fax (408) 904-5215; E-mail; bdf@difranza.com.