POST-EGELHOFF DIVORCE DIVISION OF ERISA BENEFITS

BY
RONALD S. GRANBERG, J.D., CFLS

During his marriage with Wilma, Henry accrued benefits under his employer-sponsored ERISA retirement plan. Henry named Wilma his primary plan beneficiary and named his daughter Debbie (from his previous marriage) his contingent plan beneficiary.

When Henry and Wilma divorced in California in 2002, their community property consisted entirely of two assets: Henry's ERISA plan (community property value: $425,000) and a mortgage-free residence (community property value: $425,000). The parties' stipulated divorce judgment was simple: Henry received the plan and Wilma received the residence. Both assets were explicitly described in the integrated marital settlement agreement. Wilma specifically waived all interest in the plan and Henry specifically waived all interest in the residence.

After the divorce, Henry rewrote his living trust to delete any provision for Wilma and to make Debbie his sole beneficiary. Unfortunately, Henry forgot to submit to his retirement plan administrator the forms necessary remove Wilma as his ERISA plan beneficiary. Henry died.

This article's "Presented Issue" is: "Will Wilma or Debbie receive the $425,000 in plan benefits?"

No California authority has addressed the Presented Issue, and non-California precedent is divided.

Equitable considerations strongly favor Debbie's receiving the benefits. After all, Wilma specifically waived her interest in the plan, and in exchange for her waiver received a residence worth $425,000. If the plan benefits now go to Wilma as well, she will have "double dipped" by receiving the entire $850,000 community estate, and will have been unjustly enriched.

Post-divorce Automatic Revocation of Testamentary and Non-probate Transfer Documents

When a couple divorces, Probate Code section 6122 provides that the existing will or trust of each is automatically revoked to the extent that the other spouse was to receive a benefit under the testamentary document. (Thus, ironically, the prudent action Henry *did* take in rewriting his trust was unnecessary!)

Of course, wills and trusts are not the only means by which property passes upon death. Property may also pass by means of "non-probate transfers" (Prob. Code §§5600(e), 5000) such as retirement beneficiary designations, pay-on-death bank accounts, and transfer-on death vehicle registrations.

Probate Code section 5600 (applicable to post-2001 dissolution judgments and deaths) provides that when a couple divorces, existing non-probate transfers are automatically revoked to the extent that an ex-spouse was to receive a benefit under such a transfer.

Probate Code sections 6122 (automatic post-divorce revocation of *testamentary documents* benefiting an ex-spouse) and 5600 (automatic post-divorce revocation of *non-probate transfer documents* benefiting an ex-spouse) are both based on common sense recognitions of the facts that: (a) a divorced person doesn't want his ex-spouse to benefit financially from his death, and (b) the divorced person's failure to change the document after the divorce was inadvertent.

A statute such as Probate Code section 5600 is termed a "re-designation statute," because its effect is the "re-designation" of a beneficiary under a non-probate transfer document. In the Presented Issue, Henry's divorce from Wilma re-designated Debbie his primary retirement plan beneficiary. (After operation of a re-designation statute, the new beneficiary will be either the named contingent beneficiary or, if none, the person(s) inheriting the decedent's property pursuant to testamentary document or intestate succession rules.)

Egelhoff Invalidated Re-designation Statutes

In 1994, the Washington legislature passed a re-designation statute (Wash. Rev. Code §11.07.010(2)(a)) virtually identical with California's Probate Code section 5600.

In *Egelhoff v. Egelhoff* 532 U.S. 141 (2001), the United States Supreme Court invalidated the Washington statute insofar as it attempted to re-designate ERISA plan beneficiaries, thereby also invalidating Probate Code section 5600

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to the same extent. *Egelhoff* held that ERISA preempted and invalidated the Washington statute, due to the fact that the statute "relate[d] to [an] employee benefit plan" within the meaning of 29 U.S.C. §1144(a).

Egelhoff didn't resolve the Presented Issue, however, because *Egelhoff* didn't consider equitable doctrines such as waiver and unjust enrichment.

The next five sections of this article will discuss three pre-*Egelhoff* cases and three post-*Egelhoff* cases that discussed the Presented Issue.

Brandon v. Travelers

The Fifth Circuit Court of Appeals anticipated *Egelhoff* by seven years when it decided *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321 (5th Cir. 2003). *Brandon* held that ERISA preempted Texas' re-designation statute (Tex. Fam. Code Ann. §3.632), but that ex-Wife was nevertheless prevented from receiving Husband's ERISA benefits, because she had waived those benefits in the parties' divorce.

Richard Brandon designated his wife Wanda the primary beneficiary, and designated his brother Gary the contingent beneficiary, of his employer-provided ERISA plan benefits. When Richard and Wanda divorced, their decree vaguely stated that "each spouse would separately retain his or her own employment benefits."

Richard failed to remove Wanda as his primary beneficiary before he died.

The retirement plan, knowing that Texas' re-designation statute had automatically terminated Wanda's beneficiary rights after the divorce, sent Gary $110,000 in benefits. Wanda sued Gary for the $110,000.

The trial court entered summary judgment for Gary, ruling that ERISA did not preempt Texas' re-designation statute, and that the parties' divorce decree was *res judicata* regarding Wanda's former right to receive Richard's ERISA benefits.

The Fifth Circuit Court of Appeals disagreed with the trial court's preemption analysis and overruled the trial court's decision on that point, holding that ERISA *did* preempt Texas' re-designation statute. Nevertheless, applying waiver principles of federal and state common law, the Fifth Circuit affirmed the trial court's ruling that Wanda was entitled to no plan benefits: "The divorce decree was a bona fide waiver of her rights to the [ERISA benefits] and we are bound to carry out the provisions of the agreement signed by the parties" (*Id.*, at p. 1327.)

Fox Valley v. Brown

An en banc Seventh Circuit Court of Appeals decided *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275 (7th Cir. 1990).

James Brown designated his wife Laurine the primary beneficiary, and designated his mother Dessie the contingent beneficiary, of his employer-provided ERISA benefits.

When the parties divorced, Laurine waived her interest in the plan in exchange for her receipt of other marital assets. James died nine months after the divorce; the parties had continued to live together from their divorce until James' death. James didn't change his beneficiary designation.

The Fund filed an interpleader action against Laurine and Dessie to obtain judicial direction for proper distribution of James' plan benefits.

The trial court entered summary judgment for Dessie, finding that Laurine had waived her right to James' benefits. When Laurine appealed, the Seventh Circuit affirmed, observing:

> ... this is a case of first impression under ERISA. We must determine whether a divorced spouse who was designated as a beneficiary prior to the divorce will still receive the Death Benefit despite a provision in the divorce settlement waiving any rights to the benefit. Because ERISA preempts state pension benefit laws, 29 U.S.C. § 1144(a), we must find the answer to this issue within ERISA itself or in the federal common law interpreting ERISA. (*Id.*, at p. 278)
>
> The district court was correct in recognizing that a non-participant in an ERISA pension plan could waive rights to pension benefits. Laurine waived her right to any portion of the Death Benefit. (*Id.*, at p. 282)

The *Fox Valley* rule survived *Egelhoff*, as shown by cases such as *Melton v. Melton* (*infra*) and *Weaver v. Keen* (*infra*).

Estate of Altobelli v. IBM

The Fourth Circuit dealt with a similar issue in *Estate of Altobelli v. IBM*, 77 F.3d 78 (4th Cir. 1996). Thomas Altobelli worked for IBM and designated his wife, Helen Dietsch, the beneficiary of pension and life insurance benefits he had through employer-sponsored ERISA plan.

The parties' divorce decree awarded Thomas his "... pension and other deferred compensation plans, if any," but failed to mention his life insurance policy. Thomas didn't remove Helen as his plan beneficiary during the 8 years between the divorce and his death.

Thomas' estate filed suit, alleging that in the divorce Helen had waived her right to the plan benefits. The trial court granted summary judgment for Helen regarding the life insurance policy, but denied her the pension benefits, finding that she had waived them in the divorce.

The *Altobelli* Court discussed three court of appeal decisions (*Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, (*supra*); *Lyman Lumber Co. v. Hill* (8th Cir. 1989) 877 F.2d 692, 693-94; and *Metropolitan Life Ins. Co. v. Hanslip* (10th Cir. 1991) 939 F.2d 904, 907)) holding that a non-member spouse may waive an ERISA beneficiary designation in a divorce judgment, and two court of appeal decisions (*Krishna v. Colgate Palmolive Co.* (*2d Cir.* 1993) *7 F.3d 11, 16*) and *McMillan v. Parrott* (6th Cir. 1990) 913 F.2d 310, 311-12)) holding the opposite. The *Altobelli* Court found the former decisions better reasoned, and adopted their rule for the Fourth Circuit, stating:

> ... giving effect to a waiver contained in a domestic relations order does not burden plan administrators in a manner violative of ERISA. ERISA was designed to simplify plan administration as much as possible, but it still requires admin-

istrators to consider divorce decrees to determine whether they are Qualified Domestic Relations Orders, [footnote omitted] which are enforceable. [citation omitted] Thus, as the Seventh Circuit determined, "no such additional burdens will be imposed" by enforcing waivers.

In this case, each party clearly intended to relinquish all interests in the pension plans of the other. Congress's provision for QDROs reveals that, in some situations, it deems the intent of the parties sufficiently important to override the policy of simplified administration. Because enforcement of a divorce agreement's specific waiver of ERISA pension-plan benefits would require no marginal infringement of that policy beyond the infringement already necessitated by the QDRO provision, and since ERISA does not directly address the issue, we join the Seventh Circuit in holding as a matter of federal common law that such a waiver is to be given full effect. (*Id.*, at pp. 81-82)

Melton v. Melton

Melton v. Melton 324 F.3d 941 (7th Cir. 2003) decided that, despite *Egelhoff's* holding that ERISA preempts state law in determining beneficiary status, ERISA does *not* preempt a waiver of interest by a plan beneficiary. Thus, *Melton* demonstrates that *Egelhoff* didn't affect the Presented Issue.

During Richard Melton's marriage to Peggy, Richard named Peggy beneficiary of his ERISA employee benefits, which included a group term life insurance policy. Richard failed to remove Peggy as his designated beneficiary subsequent to their divorce. After Richard died, his daughter (by a prior marriage) Alexandria sued for the death benefits, claiming that Peggy had waived the benefits in the divorce. The trial court granted Peggy summary judgment.

The *Melton* court reaffirmed *Fox Valley:*

> ... we still must address Alexandria's contention that Peggy waived her interest in [Richard's ERISA life insurance benefits] by the terms of her divorce agreement with Richard. Even where ERISA preempts state law with respect to determining beneficiary status under an ERISA-regulated benefits plan, ERISA does not preempt an explicit waiver of interest by a nonparticipant beneficiary of such a plan. *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown,* 897 F.2d 275, 282 (7th Cir. 1990) (en banc)... Essentially, when we are evaluating whether the wavier is effective in a given case, we are more concerned with whether a reasonable person would have understood that she was waiving her interest in the proceeds or benefits in question than with any magic language contained in the waiver itself. (*Id.*. at p. 945)

Nevertheless, the Seventh Circuit affirmed the trial court's ruling for Peggy, finding that the parties' divorce judgment had not been specific enough for Peggy to have waived the death benefits in Roger's policy.

Weaver v. Keen

Frank Weaver named his wife Patsy primary beneficiary and his mother, Rita, contingent beneficiary, of his ERISA annuity plan. When Frank and Patsy divorced, Patsy waived any interest in the plan, agreeing that the plan would be Frank's sole and separate property. Frank died without changing his beneficiary designation.

Rita sued Patsy, alleging that Patsy had waived the plan benefits in the divorce and that the account belonged to Rita (after Rita died the suit was continued by Diana, her personal representative). The trial court held that the account belonged to Patsy. The Texas intermediate appellate court reversed, holding that the account belonged to Rita's estate.

In *Weaver v. Keen* (2003) 121 S.W.3d 721, the Texas Supreme Court affirmed the intermediate appellate court, basing its decision on Patsy's waiver. The court explained that ERISA does not prohibit a plan administrator from recognizing a beneficiary's waiver, disclaimer, or other repudiation of plan benefits. Because Patsy's waiver of her interests in the plan was specific, knowing, and voluntary, the court found it to be enforceable under federal common law. The court held:

> "Patsy argues that ... ERISA mandate[s] the payment of plan proceeds to her, despite her unequivocal agreement in the divorce decree to relinquish her interest in them ... [¶] While Patsy's interpretation is simple and easy to apply, we do not believe that ERISA's text prohibits a plan administrator from recognizing a beneficiary's waiver, disclaimer, or other repudiation of plan benefits. [¶] ... see also *Melton v. Melton,* 324 F.3d 941, 945 (7th Cir. 2003) (noting, in *post-Egelhoff* decision, that "ERISA does not preempt an explicit waiver of interest by a nonparticipant beneficiary of such a plan"). [footnote omitted] These courts have relied upon common-law principles to conclude that the named beneficiary waived entitlement to plan benefits. Only the Sixth Circuit has unambiguously taken the minority view, that ERISA section 1104(a)(1)(D) expressly requires that plan benefits be paid to the designated beneficiary regardless of the circumstances and precludes the application of federal common law. See *McMillan v. Parrott,* 913 F.2d 310, 311-12 (6th Cir. 1990); see also *Metropolitan Life Ins. Co. v. Marsh,* 119 F.3d 415, 421 (6th Cir. 1997); *Metropolitan Life Ins. Co. v. Pressley,* 82 F.3d 126, 130 (6th Cir. 1996); cf. *Krishna v. Colgate Palmolive Co.,* 7 F.3d 11, 14-16 (2d. Cir. 1993) (holding that, although ERISA was "silent on the matter," state law was preempted and "the cause of uniform administration" would not be served if state law were adopted as federal common law). [¶] We do not believe that *Egelhoff* precludes the application of federal common law to this dispute.

Second and Sixth Court of Appeal Cases Are Contra

Decisions by the Sixth Circuit (*McMillan v. Parrott,* 913 F.2d 310, 311-12 (6th Cir. 1990)) and Second Circuit (*Krishna v. Colgate Palmolive Co.,* 7 F.3d 11, 16 (2d Cir. 1993)) oppose the authorities cited above, holding that hold that ERISA preempts divorce judgment waivers.

Conclusion

Authorities holding that ERISA doesn't preempt waiver are better reasoned than the opposing authorities.

Even if *Egelhoff* properly invalidated re-designation statutes, there are meaningful differences between: (a) a state statute (such as a re-designation statute) that mandates wholesale modification of ERISA beneficiary designations without the knowledge or consent of any plan member or named plan beneficiary, and (b) a voluntary and intentional contractual waiver of beneficiary rights, bargained for and agreed to by the member and the named beneficiary in a particular case.

ERISA preemption supersedes "*State laws* [that] relate to [an] employee benefit plan . . ." (29 USC §1144(a), emphasis supplied). Doctrines of waiver and unjust enrichment are based on common law equitable principles, and not on state statutes enacted to defeat ERISA plan beneficiary designations. Principles of federalism are called up by a state legislature's attempt to supersede ERISA, but are not called up by a judicial application of equitable principles predating ERISA by centuries.

Courts understandably desire to protect an ERISA beneficiary who, through no fault or involvement of her own, loses retirement rights due to anti-ERISA legislation such as a re-designation statute; whereas courts should have no interest in "protecting" a former spouse who made a bargained-for waiver of the plan participant's ERISA benefits.

ERISA would be an odd law indeed if it allowed a spouse to enter into a binding marital settlement agreement, receive consideration for the agreement, sign a waiver of rights, and later receive the very benefits she intentionally waived. This inequitable result cannot be what Congress had in mind while drafting ERISA's administration provisions.

The mere fact that legal complexities (e.g., determining whether a waiver has occurred) arise doesn't justify a harsh "bright line rule" (such as automatic ERISA preemption of waivers) exempting courts from dealing with those complexities. That's what courts are for.

The proper solution to the Presented Issue is "Debbie should receive her father's $425,000 in ERISA plan benefits. To award the benefits to Wilma after she received a $425,000 residence in exchange for her waiving her interest in the plan benefits would be unfair." ■

LEGISLATIVE UPDATE

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This bill amends Family Code § 6929, which authorizes a minor who is 12 years of age or older to consent to medical care and counseling relating to the diagnosis and treatment of a drug or alcohol related problem. The "treatment plan" for a minor under this section requires the involvement of a "professional person," and under this bill that would include a "psychological assistant, and an associate clinical social worker" in addition to physicians, surgeons, registered nurses, psychologists, clinical social workers and therapists.

The bill passed both houses and was approved by the Governor on June 23, 2004. It is enacted in Chapter 59 of the 2004 session.

Child Abuse Investigation and Reporting

AB 2531 [amends list of persons required to report child abuse]

This bills amends the Child Abuse and Neglect Reporting Act (CANRA) regarding persons required to report to a specified agency whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect. Failure to report an incident is a crime punishable by imprisonment in a county jail for a period of six months, a fine of up to $1,000, or by both that imprisonment and fine.

This bill adds to the CANRA list of mandated reporters any person providing in home supportive services to a child under the Welfare and Institutions Code. However, as amended, it would also provide that the duty to report would also be dependent upon receipt of "training or instructional materials."

The bill was opposed by FLEXCOM, but passed the Assembly and received a "do pass" vote from the Senate Public Safety Committee. The bill will be considered by the full Senate.

AB 2749 [child abuse investigations]

This bill revises CANRA to provide that those persons performing child abuse or neglect investigations shall advise those persons being investigated of the complaints or allegations, in a manner consistent with protecting the rights of informants. This bill also adds standards for child abuse reporting training programs.

The bill as amended has passed both houses and is set for enrollment.

SB 1313 [re-defining sexual assault and changing reporting requirements]

This bill amends CANRA, to except from reportable "sexual assault" certain consensual acts between minors, and to specify that mandated reporters of sexual abuse shall not report such abuse after the victim is an adult, unless the mandated reporter knows or has reasonable belief that the abuser continues to abuse a victim under 18.

Further, the amended bill would also make changes in the definition of willful harming or injuring of a child, would specify that volunteers supervising children are not mandated but are encouraged reporters of abuse, and would make numerous changes in the training and reporting procedures for child abuse and neglect.

The bill as amended passed the Senate and was further amended in the Assembly,

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