

JUNE 19, 2008

TO: FAMILY LAW PRACTITIONERS

FROM: MARC S. SCHECHTER, ESQ.

As you are aware, issues relating to the division of retirement and other employee benefits are among the most complicated facing family law practitioners. Since the creation of the "QDRO" concept as part of the Retirement Equity Act of 1984, there has been an evolving body of regulatory pronouncements and judicial decisions impacting the division of retirement plan benefits.

We hope the following commentaries related to recent developments with QDROs will assist you in advising your clients on these matters.

#### **SUPREME COURT TO HEAR ISSUE OF EX-SPOUSE WAIVER OF BENEFITS IN A DIVORCE**

Have you ever drafted a Marital Settlement Agreement and included a provision allowing the nonemployee spouse of a retirement plan participant to waive his or her rights to their interest in the plan? Did you ever wonder whether that provision was in compliance with the Employee Retirement Income Security Act of 1974, as amended ("ERISA")? The Supreme Court is about to answer that question.

The Supreme Court decided in February 2008, that it will hear a case from the Fifth Circuit, *Kennedy v. Plan Administrator for Dupont Savings and Investment Plan*, regarding an ex-spouse's waiver of retirement benefits in divorce. Limiting the grant of certiorari to the third question presented, the Court will hear whether the Fifth Circuit was correct in concluding that ERISA's Qualified Domestic Relations Order provision, 29 U.S.C. §1056(d)(3)(B)(i), is the only valid way a divorced spouse can waive her right to receive her ex-husband's pension benefits under ERISA. Petitioner, the estate of the ex-husband, argues that the divorce decree validly waived the ex-wife's right.

During the divorce, the parties negotiated that the participant would receive his entire Savings and

Investment Plan (SIP) and his ex-wife would waive her interest to any and all benefits from such plan. The parties entered a provision into the judgment stating that Ms. Kennedy agreed to be divested of "all right, title, interest, and claim in and to . . . the proceeds therefrom, and any other rights related to any . . . retirement plan, pension plan, or like benefit program existing by reason of [Mr. Kennedy's] employment." No Qualified Domestic Relations Order was prepared or submitted to the SIP. In 2001, Mr. Kennedy died, without ever having replaced Ms. Kennedy as the beneficiary of his SIP. The estate sued, claiming that Ms. Kennedy waived her rights to the SIP benefits through the divorce decree.

ERISA's anti-alienation provisions provide that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). A QDRO is the only exception to the anti-alienation provisions. The Fifth Circuit, based thereon, ruled that the divorce decree was not enough to be considered a valid waiver of the benefits under the SIP.

In the event the Supreme Court agrees with the Fifth Circuit, family law attorneys should review their past MSAs for provisions allowing for waiver of retirement benefits and then should have a QDRO

drafted to remedy the problem.

**QDRO NOW REQUIRED TO BE FILED AT THE  
TIME THE COURT DISSOLVES THE MARRIAGE**

No longer are the days when the family law attorneys are off the hook with regard to the QDRO. Effective January 1, 2008, the California Family Code § 2337 was amended to require the entry of a QDRO simultaneously with the judgment of dissolution. Under the same amendment, joinder documents may no longer be required, depending on whether it is precluded or made unnecessary by ERISA.

In drafting the amendment, it was recognized that oftentimes the parties are no longer represented by family law attorneys at the stage of drafting the QDROs and pertinent information was missing from the judgment, including the method of distribution and whether the alternate payee had a right to survivor benefits. The legislature, therefore, decided that upon entry of dissolution, and as a condition to entry of the judgment, the court must do one of three things (1) enter a QDRO; (2) enter an interim QDRO; or (3) create an attachment to the judgment as follows:

Each party (insert names and addresses) is provisionally awarded without prejudice and subject to adjustment by a subsequent domestic relations order, a separate interest equal to one-half of all benefits accrued or to be accrued under the plan (name each plan individually) as a result of employment of the other party during the marriage or 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 or domestic partners for purposes of any survivor rights

or 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 the survivor benefit if, at the time of the death of the participant, there is no other eligible recipient of the survivor benefit.

So far, we have seen very few attorneys or judges requiring the QDRO be entered simultaneously with the entry of judgment; however, that may soon change. In addition, we have still been filing joinder documents as a standard practice for all qualified retirement plans, including governmental plans such as CalPERS and CalSTRS. We have not yet had any joinder documents rejected by the court. It, therefore, appears that the superior court may not yet be enforcing the new sections of Family Code § 2337.

**DIVORCE OF SAME SEX PARTNERS AND ERISA  
BENEFITS**

As you may know, on May 15, 2008, the California Supreme Court overturned the state's ban on same-sex marriage and, although family law attorneys have probably yet to begin to see any same-sex partners file for divorce, it's probably only a matter of time before it occurs, and when it does, family law practitioners should pay close attention to the differences between California law and federal law with regard to the division of community property that is governed by federal law, such as ERISA. Although California recognizes same-sex couples as spouses, the federal Defense of Marriage Act, passed in 1996, states that a marriage is between a man and a woman. Therefore, for purposes of dividing federally governed retirement plans pursuant to a QDRO, same-sex partners are not recognized as alternate payees and would not be entitled to a direct distribution of a "community property interest" from a qualified retirement plan. In addition, the Internal Revenue Code does not recognize same-sex partners

and, therefore, there could be other potential issues with regard to any community property distribution that involves federal taxes. When the time strikes, Butterfield Schechter•LLP can assist in advising clients with regard to same-sex community property distribution that is subject to federal law governing employee benefit plans.

#### **DIVORCE, FINANCIAL DIFFICULTIES, AND YOUR 401(K)**

With couples getting divorced during a downward trend in the economy, we are seeing more and more people tapping into their 401(k) plans to pay mortgages and prevent foreclosures, as well as to pay credit card debt through the use of QDROs. Before or even during the divorce though, one of the parties may have already tapped into his or her 401(k) assets through the use of a loan or a hardship withdrawal. When evaluating the worth of the 401(k), make sure you know the current value.

Although taking a loan or a hardship withdrawal is a viable option when attempting to avoid foreclosure or other hardship circumstances, borrowing or withdrawing from the 401(k) plan can lead to problems for the nonparticipant spouse. Although some plans require spousal consent to take a withdrawal or a loan from a 401(k), most do not. It depends on the employer and the plan document governing the 401(k). As soon as the divorce is pending, the participant's spouse's attorney should send a notice of adverse interest to the 401(k) plan to put a flag on the account so that the employee spouse cannot take any withdrawals or loans during the pendency of the divorce, since typically the amount accumulated in the 401(k) during the marriage is community property subject to division.

#### **ERISA TRUMPS STATE PROBATE LAW**

A Pennsylvania state appellate court ruled that ERISA trumps a Pennsylvania Probate statute that calls for the revocation of a beneficiary designation

in the case of a divorce. An ex-wife brought a suit for life insurance proceeds against the decedent's estate. The Pennsylvania Superior Court, following the U.S. Supreme Court, found that ERISA preempted the state law where the life insurance policy was governed by ERISA. The court found that the ERISA plan document governed the determination of the beneficiary, not the state probate statute. In so ruling, the court stated that the statute "runs counter to ERISA's command . . . that the fiduciary shall administer the plan in accordance with the documents and instruments governing the plan."

This would likely be the case in California, since the ruling was based on a U.S. Supreme Court case. Therefore, it's not enough to simply rely on state law with regard to beneficiary designations on insurance policies, the attorneys should look into whether the insurance policy is issued pursuant to an ERISA plan and, if so, what the plan document states about beneficiary designation in the event of death of the insured spouse. Prudence dictates advising your client to change their beneficiary designation upon divorce.

#### **THE FIFTH CIRCUIT DECIDES COMPETING POST-MARITAL CLAIMS**

Make sure to get your client's QDRO in first! Although not very common, there are times when two ex-spouses are competing for the same benefits in their ex-husband's retirement plan. In *Taliaferro v. Goodyear Tire & Rubber Co.*, 2008 WL 345532, the Fifth Circuit held that the plan did not have to pay the husband's retirement benefits to his second wife and to the first wife for child support in absence of showing that payments were required pursuant to a QDRO. In the case, the husband was married twice. The first wife sued the husband for child support, and the second wife sued Goodyear for payments in another state court in a divorce proceeding. Goodyear stopped making payments

until it received a QDRO from the U.S. District Court stating how payments were to be made. The first wife argued that pension benefits are subject to domestic support obligations under Texas state law. The Fifth Circuit decided that ERISA preempts state law with regard to assignment and alienation of benefits under an ERISA plan. The court concluded

that if the ERISA requirement to present a QDRO is not satisfied, the plan cannot be compelled to pay support obligations out of the pension benefits. The case was remanded back to the District Court for further adjudication to determine whether QDROs were presented to Goodyear for each spouse and, if so, whether one had priority over the other.

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Butterfield Schechter♦LLP is San Diego County's largest law firm focusing its practice primarily on employee benefit plan matters. As part of our overall Employee Benefits/ERISA practice, our firm has significantly enjoyed working with a large number of local family law attorneys and their clients on QDRO, employee benefits plan, and ERISA related issues. We have extensive experience in:

- Analyzing and valuing the community property in retirement plans, including, but not limited to:
  - 401(k) Plans, Profit Sharing Plans
  - IRAs
  - traditional pension plans
  - stock option plans and other executive compensation plans
  - disability pensions and severance benefits
- Drafting QDROs to divide these benefits.

If you have any questions regarding any of the items addressed herein, or any employee benefits plan or QDRO issue, please do not hesitate to call, write or e-mail us. We appreciate the opportunity to be of service to your clients in these areas.

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