BUTTERFIELD SCHECHTER LLP
ATTORNEYS & COUNSELORS

Employee Benefits/ERISA Advisory Report - Family Law Issues

Summer 2011

Edition Authors:

- Marc S. Schechter
- Elizabeth Van Clief

Inside this issue:

Domestic Relations Orders Issued After Death of Participant Can Still Be Qualified

On June 10, 2010, the Department of Labor ("DOL") finalized regulations regarding the timing of qualified domestic relations orders. (See 29 CFR Part 2530.206.)

Of particular interest to our QDRO practice is that the DOL confirmed a domestic relations order will not fail to be a QDRO solely because it is issued after the death of the participant. Based on these final regulations, we advise family law attorneys and divorcing spouses that it may be possible to obtain benefits pursuant to a QDRO even after the death of the participant. The surviving ex-spouse should not "give up" on receiving benefits from a plan just because the participant passed away before the final QDRO was served on the plan.

It should be clarified that the final regulations do not guarantee that benefits will still be available to a surviving ex-spouse who serves the QDRO after the death of the participant. For example, if the plan's provisions state that all benefits cease on the death of the participant (lifetime monthly payment with no survivor benefit) then the ex-spouse may not be entitled to an award of benefits after the death of the participant. This is consistent with the ERISA requirement that a QDRO cannot "provide any type or form of benefit, or any option, not otherwise provided under the plan." (See ERISA 206(d)(3)(D)(i).)

Based on the final regulations, upon the participant's death, a surviving ex-spouse should find out from the plan administrator if there are any benefits that can still be paid pursuant to a QDRO. If so, the final QDRO should be entered as soon as possible.

At Last, The Supreme Court Addresses Survivor Benefits - A Second Look at *Sonne*

Survivor benefits are perhaps the most complicated aspect of dividing retirement benefits during divorce. The Supreme Court of California in *In re Marriage of Sonne* provides much needed direction regarding the appropriate method to divide survivor benefits. *In re Marriage of Sonne* (2010) 185 Cal.App.4th 1564.

Unfortunately, the Supreme Court's ruling regarding survivor benefits was overshadowed in part by the other issue present in that case which was the repurchase of the participant's service credit from CalPERS with community versus separate property funds.

This article will focus on the issue of greater applicability to divorcing spouses, how to apportion survivor benefits between the community and separate estates.

In *Sonne*, the Husband was a participant in the California Public Employees' Retirement System ("CalPERS"). The trial court applied the time rule to the monthly allowance payments to be made

(Continued on page 2)

At Last, The Supreme Court Addresses Survivor Benefits - A Second Look at *Sonne*

(Continued from page 1)

by CalPERS during the participant's life. As a result of applying the time rule, 70 percent of the allowance payments during participant's lifetime were community; therefore, Wife would receive 35 percent of the allowance payments during participant's lifetime.

However, the trial court awarded 100 percent of the survivor benefit to Wife which was payable in the event that Husband passed away before Wife. By doing this, the trial court eliminated Husband's ability to designate a different person for survivor benefits in the future.

A trial court would not abuse its discretion by dividing survivor benefits using the same percentage as the retirement allowance paid during participant's lifetime.

Husband appealed the trial court's ruling and argued that the trial court should have awarded Wife only her share of the community's interest in each survivor benefit payment. In other words, Husband argued that Wife should only receive 35 percent of each survivor benefit payment.

The Supreme Court ruled that "Family Code sections 2440 and 2610 and *Lehman* required the trial court to apportion the retirement allowance and the survivor benefit between the community and separate interests, and to equally divide the community interest." *Sonne* at 1577.

The Supreme Court disagreed with the trial court's decision to award Wife 100 percent of the survivor benefits despite the fact that Wife was awarded 35 percent of the retirement allowance. The Court noted that the "relative contributions of the separate and community estates were the same with respect to the survivor benefit as they were with respect to the retirement allowance."

Although the Supreme Court did not say that the trial court should always apportion the survivor benefit using the time rule method, in our opinion the Supreme Court's most important statement was as follows:

> The trial court could use the same method as it uses to apportion the separate and community interests in Husband's retirement allowance [time rule]. . . . The trial court could have achieved a result that was representative of the relative contributions of the separate and community estates to the survivor benefit by ordering that the monthly survivor benefit payments, when and if they came due, would be paid into a trust from which Wife would receive her share of the community interest in each payment and the remainder of each payment would go to Husband's estate, heirs, or other designee.

This ruling by the Court provides much needed guidance in a murky and often contentious area of family law. *Sonne* stands for the rule that a trial court would not abuse its discretion by dividing survivor benefits using the same percentage as the retirement allowance paid during participant's lifetime.

In our QDRO practice, the majority of Martial Settlement Agreements provide that benefits earned in a defined benefit pension plan are divided pursuant to the time rule. Therefore, we are expecting that *Sonne* will result in Marital Settlement Agreements and Judgments also awarding survivor benefits to be divided using the time rule formula. We suggest whatever the agreement is (if one can be reached), it be addressed in the MSA to avoid a later round of litigation over this issue when the QDRO is being prepared.

Fifth Circuit Affirms Ruling that Sham Divorces Cannot Be Challenged By the Plan Administrator

On July 20, 2011, the Fifth Circuit Court of Appeals ruled that a Plan Administrator cannot "consider the good faith of the underlying divorce" in determining whether a Domestic Relations Order satisfies the statutory criteria necessary to be valid. *Brown v. Continental*, No.10-200015 (July 18, 2011).

In *Brown*, Continental Airlines ("Continental") filed suit against pilot participants and their spouses requesting a return of funds previously paid pursuant to QDROs. Continental alleged that the QDROs did not satisfy the statutory criteria because the divorces were shams. Continental believed pilot participants obtained "fake" divorces for the purpose of cashing out all of their pension benefits early because the Plan Document only permitted a lump sum distribution if the distribution was made pursuant to a QDRO.

The Fifth Circuit ruled that ERISA's enforcement scheme does not provide the type of remedy requested by Continental. The court refused to authorize a private entity such as Continental to investigate "employees' private lives in order to judge the genuineness of the intentions behind their divorces."

This case reinforces the jurisdictional limits of federal and state laws regarding QDROs. In general, federal laws govern the Plan Administrator's interpretation of the QDRO whereas state laws govern the divorce proceedings and the determination of what is community versus separate property.

The court refused to authorize a private entity such as Continental to investigate "employees' private lives in order to judge the genuineness of the intentions behind their divorces."

Domestic Relations Orders May Be Issued in a Tribal Court If Recognized Within the State's Jurisdiction

On February 2, 2011, the Department of Labor ("DOL") issued Advisory Opinion 2011-03A discussing that a domestic relations order issued under tribal law by a Family Court of a federally-recognized Native American Tribe could meet the requirements of ERISA as a valid domestic relations order.

The DOL stated that a domestic relations order is not required to be issued by a State Court. Instead, the DOL explained that a Family Court of a federally-recognized Native American Tribe could issue a domestic relations order as long as the Family Court is "recognized within the State's jurisdiction as being empowered to achieve such a division of property pursuant to State domestic relations law (including community property law)."

Therefore, the DOL left open the possibility that a state can grant jurisdiction to tribal courts to divide retirement benefits, and as a result, the tribal courts can issue domestic relations orders that are valid assignments of retirement benefits under ERISA.

In the Advisory Opinion, the particular state at issue was New Mexico, and the DOL concluded that the Family Court of the Navajo Nation in New Mexico could not issue a domestic relations order under ERISA because New Mexico had not granted jurisdiction to the Family Court of the Navajo Nation to divide community property retirement benefits.

As of the date of this article, California has not issued clear guidance regarding whether tribal family courts are recognized by California as having jurisdiction to divide retirement benefits. Hopefully this issue will be clarified in California so that we can advise clients whether or not a QDRO filed in a California tribal court is valid.

BUTTERFIELD
SCHECHTER◆LLP
ATTORNEYS & COUNSELORS

10616 Scripps Summit Court
Suite 200
San Diego, California 92131

Phone: (858) 444-2300
Fax: (858) 444-2345
www.bsllp.com
mschechter@bsllp.com
evc@bsllp.com

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 with:

- Analyzing and valuing the community property interest 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 contact us. We appreciate the opportunity to be of service to your clients in these areas.

For more information about Butterfield Schechter◆LLP and our attorneys, please visit us at www.bsllp.com.

Boyd Reinforces *Kennedy* Rule That MSA Is Not a Valid Waiver of Retirement Benefits

Following on the heels of the Supreme Court case Kennedy v. DuPont Savings, the Fourth Circuit ruled in Boyd v. Metropolitan Life on March 31, 2011, that a plan administrator properly paid benefits to an ex-husband despite the ex-husband's waiver of his right to those benefits in a marital settlement agreement. Boyd v. Metropolitan Life Ins. Co., 626 F.3d 138 (4th Cir. 2011).

In Boyd, Emma Boyd ("Wife") earned benefits under an ERISA life insurance plan (the "Plan") as a result of her employment with Delta Airlines, Inc., during marriage. At the time of enrollment in the Plan, Wife completed a beneficiary designation naming her husband Robert Alsager ("Husband") as the primary beneficiary and her mother as the secondary beneficiary.

Subsequently, Husband and Wife separated and, as part of the settlement, Husband agreed to waive any claim to Wife's Plan benefits. The parties signed a marital settlement agreement which was filed in Charleston, South Carolina, containing a provision releasing claims to each other's property as follows:

Each party relinquishes and disclaims all right, claim or interest whether actual, inchoate or contingent, in law and in equity that she or he may acquire in the property or estate of the other, including without limitation . . . the right to receive proceeds, funds or property as a beneficiary under any life insurance policies.

However, after the agreement was signed, Wife did not change her beneficiary designation with the Plan.

Upon Wife's untimely death, the Plan processed a payment to Husband based on the beneficiary designation on file that listed Husband as the primary beneficiary.

The Fourth Circuit upheld the lower court's ruling that MetLife properly paid the claim to Husband. The Fourth Circuit relied on Kennedy and the ERISA statute that "instructs employers to distribute benefits 'in accordance with the documents and instruments governing the plan.'" Citing to Kennedy and 29 U.S.C. § 1104(a)(1)(D). The reasoning behind this ruling is to avoid requiring plan administrators to analyze waivers and determine whether waivers in marital settlement agreements are valid pursuant to federal common law. Requiring such an analysis would put too heavy of a burden on plan administrators. Thus, plan administrators are only required to look to plan documents to determine the payout of benefits, and a marital settlement agreement is not considered a plan document.

Although the fact pattern in Boyd appears to be exactly on point with Kennedy, the Fourth Circuit did note some interesting differences. For example, the Plan in Boyd did not have a formal procedure for changing a beneficiary designation; however, the Fourth Circuit found that even in the absence of a formal procedure, the marital settlement agreement alone was still not enough to waive the right to benefits. In addition, in Boyd there were witnesses to the signing of the marital settlement agreement; however, the Fourth Circuit again ruled that the Plan is not required to interpret the validity of a waiver that is not part of the plan documents. The Fourth Circuit also ruled that although the Plan in Boyd was a welfare benefit plan and the plan in Kennedy was a pension plan, the ERISA statutes and policies regarding waiver of benefits applied equally to both plans.

As a result of Kennedy and the Boyd case, we advise clients to change the beneficiary designation with the Plan as soon as possible once a waiver is signed. A marital settlement agreement alone is not good enough!