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| **Beyond the Bar**  **Retirement Plan Benefits - Part III (Conclusion, with Suggested Form**  **Joel Brandes**  **[Editor's Note: The conclusion of this article by Mr. Brandes, a nationally recognized matrimonial and family law specialist, focuses on court interpretations of ERISA controversies, and concludes with a suggested form for reference. The earlier articles are available in the Beyond the Bar archive.]**  **ERISA's preemption of state law in disputes involving the distribution of retirement plan benefits was emphasized by the United States Supreme Court in *Egelhoff v Egelhoff*29. While David A. Egelhoff was married to petitioner, he designated her as the beneficiary of a life insurance policy and pension plan provided by his employer and governed by ERISA. Shortly after petitioner and Mr. Egelhoff divorced, he died intestate. Respondents, Mr. Egelhoff's children by a previous marriage, filed separate suits against petitioner in state court to recover the insurance proceeds and pension plan benefits. They relied on a Washington statute which provides that the designation of a spouse as the beneficiary of a nonprobate asset--defined to include a life insurance policy or employee benefit plan--is revoked automatically upon divorce. Respondents argued that in the absence of a qualified named beneficiary, the proceeds would pass to them as Mr. Egelhoff's statutory heirs under state law. The trial courts concluded that both the insurance policy and the pension plan should be administered in accordance with ERISA, and granted petitioner summary judgment in both cases. The Washington Court of Appeals consolidated the cases and reversed, concluding that the statute was not pre-empted by ERISA. The State Supreme Court affirmed, holding that the statute, although applicable to employee benefit plans, does not "refe[r] to" or have a "connection with" an ERISA plan that would compel pre-emption under that statute.**  **The United States Supreme Court reversed, 7-2, and held that the state statute had a connection with ERISA plans and was expressly pre-empted. The Court concluded that ERISA's pre-emption section, 29 U.S.C. § 1144(a), states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. A state law relates to an ERISA plan "if it has a connection with or reference to such a plan." The court found that the state statute had an impermissible connection with ERISA plans, as it binds plan administrators to a particular choice of rules for determining beneficiary status. It noted that administrators must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents. It held that the statute implicated an area of core ERISA concern, running counter to ERISA's commands that a plan shall "specify the basis on which payments are made to and from the plan," § 1102(b)(4), and that the fiduciary shall administer the plan "in accordance with the documents and instruments governing the plan," § 1104(a)(1)(D). It also held that the state statute had a prohibited connection with ERISA plans because it interfered with nationally uniform plan administration. Administrators cannot make payments simply by identifying the beneficiary specified in the plan documents, but must familiarize themselves with state statutes so that they can determine whether the named beneficiary's status has been "revoked" by operation of law. Requiring administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of minimizing their administrative and financial burdens. It noted that differing state regulations affecting an ERISA plan's system for processing claims and paying benefits impose precisely the burden that ERISA pre-emption was intended to avoid.**  **ERISA's unbending nature was previously emphasized in *Samaroo v Samaroo*, *AT & T Management Pension Plan v Robichaud*30. Robichaud and Samaroo were divorced on October 25, 1984, by the New Jersey Superior Court, Chancery Division. The divorce decree incorporated a property settlement reached by the parties which had the following language concerning Robichaud's rights in Samaroo's pension benefits: "(d) Pensions, Profit Sharing and Bell System Savings Plan Savings Plan--(1) Husband has a vested pension having a present value, if husband were to retire at this time, of $1,358.59 per month. At the time of husband's retirement and receipt of his pension he agrees to pay to wife one half of said monthly amount."**  **Neither the decree nor the property settlement mentioned any rights to Samaroo's survivor's annuity. Samaroo died at the age of 53 on September 20, 1987, about three years after the divorce, while still actively employed by AT & T. He was covered under the AT & T Management Pension Plan, a defined benefit plan which provided pensions and survivors' annuities in amounts based on a percentage of the employee's average salary times years of service. Based on Samaroo's age and years of service, he had a vested right to a deferred vested pension, which would have begun, at the earliest, at age 55. Because Samaroo did not live to the age to qualify to receive pension payments, there were, strictly speaking, no pension benefits that ever became payable in respect of Samaroo. Therefore, the benefit expressly mentioned in the divorce settlement agreement never came to fruition. However, the Plan provided a pre-retirement survivor annuity available to the surviving spouse of any Plan participant who died after vesting but before retiring. If there is no surviving spouse, there is no annuity.**  **The Plan denied Robichaud's claim for a pre-retirement survivor's annuity because the divorce decree did not mention any entitlement to such rights, and in the absence of a surviving spouse or a QDRO designating a former spouse as such, there was no pre-retirement survivor's annuity payable in respect of Samaroo. Robichaud filed a motion in the New Jersey Superior Court, to amend the Final Judgment of Divorce nunc pro tunc to convey to her a right to fifty percent of the preretirement survivor's annuity payable in respect of Samaroo. She joined the Plan as a defendant in the divorce case. The Plan removed the action to federal court and also filed a complaint for declaratory relief in the same court. The two cases were consolidated. The district court remanded that portion of the removed case that involved the terms of the divorce, but retained jurisdiction of Robichaud's claim against the Plan for the retirement benefits. After a hearing, the New Jersey state court held that the Plan did not have standing to object to alteration of the divorce decree. Samaroo's estate did not oppose Robichaud's request to amend the decree nunc pro tunc, since conveying the survivorship rights once Samaroo was dead did not cost the estate anything, but undid the effect of Samaroo dying without a survivor. The attorney who drafted the agreement testified that the issue of survivors' benefits never came up at the time of the agreement. Robichaud herself testified that "neither Winston [nor his attorney] or I thought about the survivor rights to this pension."**  **Based on the evidence that the divorce was amicable, the state court amended the divorce decree retroactively to give Robichaud "rights of survivorship to 50% of [Samaroo's] vested pension benefits." The court stated, however, that whether or not the state court order resulted in any benefits becoming payable to Robichaud under the Plan was a question of federal law over which the federal court had retained jurisdiction and which would have to be resolved by the federal court.**  **After the state court's ruling, Robichaud and the Plan filed cross motions for summary judgment in the pending federal district court action. The district court examined the statutory requirements for a QDRO under 29 U.S.C. § 1056(d)(3)(C) and (D). The court held that the amended divorce order satisfied the specificity requirements of section 1056(d)(3)(C), but not the substantive requirements of section 1056(d)(3)(D)(i) and (ii). Under that section a domestic relations order is not a QDRO if it requires the plan to provide any type of benefits not otherwise provided by the plan or to provide increased benefits. The court relied on the reasoning of *Hopkins v. AT & T Global Information Solutions Co.*31, to conclude that entitlement to a survivor's annuity in respect of Samaroo had to be determined as of the day Samaroo died, and that the amended divorce decree represented an attempt to obtain increased benefits from the Plan. The court therefore entered summary judgment for the Plan and against Robichaud.**  **On appeal, a divided Third Circuit affirmed. It noted that the lower court relied on the statutory language defining QDROs. Under section 1056(d)(3)(D) a domestic relations order meets the requirements of this subparagraph only if such orderB (i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan, [and] (ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value).... It held that a domestic decree that would have the effect of increasing the liability of the Plan over what has been provided in the Plan (read in light of federal law) is not a QDRO, no matter what the decree's status under state law. The district court held that a decree conferring survivor's benefits on Robichaud after those benefits have lapsed would provide increased benefits and therefore cannot be a QDRO. The district court relied on the Fourth Circuit's decision in Hopkins, which recognized that defined benefit plans are based on actuarial calculations that would be rendered invalid if participants were allowed to change the operative facts retroactively.**  **In Hopkins a pension plan participant retired and began to draw his pension in the form of a joint and survivor annuity based on the lives of himself and his current wife. Sometime later, his former wife obtained a state court order that she should be treated as the participant's surviving spouse for purposes of the annuity. The Fourth Circuit held that this domestic relations order was not a QDRO because the current wife's right to the survivor's benefits vested upon the participant's retirement and could no longer be alienated. The court observed in a footnote that its holding was consistent with actuarial necessity.**  **The Third Circuit held that because the disbursement of plan benefits is based on actuarial computations, the plan administrator must know the life expectancy of the person receiving the Surviving Spouse Benefits to determine the participant's monthly Pension Benefits. As a result, the plan administrator needs to know, on the day the participant retires, to whom the Surviving Spouse Benefit is payable.**  **Robichaud argued that by determining the right to benefits as of the day of Samaroo's death, the Plan has cheated Samaroo out of receiving any benefit from participating in the Plan. The court rejected this argument because successful operation of a defined benefit plan requires that the plan's liabilities be ascertainable as of particular dates. The annuity provisions of a defined benefit plan are a sort of insurance, based on actuarial calculations predicting the future demands on the plan. Some annuity participants will die without ever receiving a payment and some participants will receive payments far in excess of the value of their contributions. The fact that some participants die without a surviving spouse to qualify for benefits is not an unfair forfeiture, as Robichaud contended, but rather part of the ordinary workings of an insurance plan. Allowing the insured to change the operative facts after he has lost the gamble would wreak actuarial havoc on administration of the Plan. The court indicated that it was inaccurate to say that Samaroo was deprived of any benefit from the Plan. Until he died, Samaroo enjoyed the right to remarry and thereby bestow on a new wife the survivorship rights under his preretirement annuity. Alternatively, after the enactment of the Retirement Equity Act, he could have entered a QDRO conveying the rights to Robichaud. But if Samaroo had entered a QDRO making Robichaud his "surviving spouse" under the Plan, he would have lost the right to confer the same survivorship benefits on a new wife by virtue of 29 U.S.C.§ 1056(d)(3)(F) which provides that to the extent QDRO designates former spouse as participant's surviving spouse, current spouse shall not be treated as spouse for purposes of plan. When Samaroo died without remarrying or naming Robichaud as alternate payee of the survivor's rights, the right to dispose of the benefits lapsed. Allowing Samaroo or his estate to preserve the right to confer the benefits on a new wife as long as he was alive and had the possibility of remarrying, and then to designate Robichaud as the surviving spouse after his death, is allowing him to have his cake and eat it, too.**  **SETTLEMENT AGREEMENT PROVISION FOR RETIREMENT BENEFITS**  **In order to protect your client's right to receive benefits from a defined benefit plan your settlement agreement should contain a provision specifying your clients rights in the retirement benefits prior to the domestic relations order becoming qualified. The following form is recommended:**  **Article \_\_\_\_\_**  **Transfer of Defined Benefit Plan 1. The (husband)(wife) is hereby referred to as the "alternate payee" and the (husband) (wife) shall be referred to as the "participant" of the \_\_\_\_\_\_\_\_\_\_\_\_ Plans an ERISA Governed Defined Benefit Plan.**  **2. Calculation of Assigned Benefits - The alternate payee is hereby granted the right to receive a portion of the participant's pension benefits in an amount equal to the actual equivalent of Fifty Percent (50%) of the Marital Portion of the participant's Accrued Benefit under the Plan as of the participant's benefit commencement date, or the alternate payee's benefit commencement date, if earlier. The Marital Portion shall be determined by multiplying the participant's Accrued Benefit by a fraction (less than or equal to 1.0), the numerator of which is the number of months of the participant's participation in the Plan earned during the marriage (from \_\_\_\_ to \_\_\_\_), and the denominator is the total number of months of the participants' participation in the Plan as of the earlier of his date of cessation of benefit accruals or the date that alternate payee commences her benefits hereunder.**  **3. Survivorship -  The alternate payee with shall be provide with Qualified Pre-Retirement Survivor Annuity (QPSA) coverage in the event that the participant dies prior to the alternate payee's benefit commencement date, but only with respect to survivor benefits attributable to the marital portion of the participant's accrued benefit.**  **4. COLA Adjustments -  The alternate payee shall receive a pro rata share of any post-retirement cost-of-living increases that are attributable to the marital portion of the participant's benefits.**  **5. Early Retirement - The alternate payee shall receive a pro rata share of any employer-provided "early retirement subsidy" granted to the participant on the date of his/her retirement. The alternate payee's benefits should be "recalculated" to include a pro rata share of the subsidy should the participant subsequently retire with an early retirement subsidy after the alternate payee has already commenced benefits.**  **6. Constructive Receipt - In the event that the Plan Trustee inadvertently pays to the Participant any benefits that are assigned to the Alternate Payee, the Participant shall immediately reimburse the Alternate Payee to the extent that he has received such benefit payments, and shall forthwith pay such amounts so received directly to the Alternative Payee within ten (10) days of receipt.**  **7. In order to effectuate the provisions of the article, a domestic relations order shall be submitted to the court by the (plaintiff)(defendant) or his/her attorney on or before \_\_\_\_\_\_\_\_\_\_\_. The order shall be in such form as is necessary for if to be "qualified" by the plan administrator, whose name and address is as follows:**  **8. Continued Jurisdiction - The Court shall retain jurisdiction with respect to this Agreement and Domestic Relations Order being submitted by the \_\_\_\_\_\_\_\_, to the extent required to maintain its qualified status and the original intent of the parties as provided herein. The Court shall also retain jurisdiction to enter such further orders as are necessary to enforce the assignment of benefits to the Alternate Payee as set forth herein, including the recharacterizations thereof as a division of benefits under another plan, as applicable, and to enforce this Article, in the event that Participant fails to comply with the provisions of this Article.**  **9. Actions by Participant - The Participant shall not take any actions, affirmative or otherwise, that can circumvent the terms and provisions of this Article or any Qualified Domestic Relations Order, made hereunder or that could diminish or extinguish the rights and entitlements of the Alternate Payee as set forth herein. Should the Participant take any action or inaction to the detriment of the Alternate Payee, he/she shall b e required to make sufficient payments directly to the Alternate Payee to the extent necessary to neutralize the effects of his/her actions or inaction and to the extent of the Alternate Payee's full entitlements as set forth here under.**  **29 US , 121 S.Ct. 1322, 69 USLW 4206 (2001)** **30 193 F.3d 185 (3d Cir, 1999)** **31 105 F.3d 153, 156 (4th Cir.1997)**    ***J*oel Brandes, who has been a frequent contributor to Beyond the Bar, is a member of the New York Bar, a Fellow of the American Academy of Matrimonial Lawyers, and a Fellow of the International Academy of Matrimonial Lawyers. He is the author of Law and the Family, New York, Second edition revised, and co-authored Law and Family New York Forms, both published by West Group. He also writes a monthly column, "Law and the Family" for the New York Law Journal. 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