THE ENFORCER

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Did Your Client Give His Ex-Wife An Unintended Gift?

ERISA (the Federal Employee Retirement Income Security Act of 1970) governs the administration of an *employer* provided pension benefit plan, life insurance policy, annuity or any other employer provided benefit. If the benefit is not employer provided it is not governed by ERISA. It requires that the administrator pay any proceeds to the beneficiary designated by the employee[1]. Requiring the benefit proceeds to be paid as stated in the plan is perfectly logical, but in some situations, this result is contradictory to the actual intent of the employee.

Let's look at an example of this problem in practice. An employee designates his wife as beneficiary and is subsequently divorced. In accordance with MCR 3.211(B)(1)-(2)[2] and MCL § 552.101(2)-(4)[3], the Consent Judgment of Divorce terminated his ex-spouse's rights in any of his employer provided benefits. Later he remarried, but surprise, before he passes, he relies on the Consent Judgment language and does not change the designated beneficiary in accordance with ERISA. The benefit proceeds were paid to his *ex-spouse*. Is the employee's *actual* intended beneficiary (new wife, children, etc.), out of luck? Are you guilty of malpractice for not advising your client to also notify his plan administrator of a change of beneficiary?

In Michigan, those proceeds can be recovered with great risks and a lot of work (this article's scope is limited to Consent Judgments of Divorce). Recovery would have to be sought not from the plan administrator but from the ex-spouse. When the Judgment of Divorce is by Consent, your client's (the decedent's probate estate) claim will be based on contract and waiver. If the situation involves a non-consensual judgment or order, there is a different basis for recovery (unjust enrichment and/or constructive trusts) which will be addressed in next month's article.

The facts of the above hypothetical are nearly identical to those in *MacInnes v Rowley*, 260 Mich App 280, 677 NW2d 889 (2004). After life insurance proceeds were paid in accordance with the policy to the ex-husband of the decedent, the estate sued the decedent's ex-husband. The estate sued to enforce the mutual waiver of the employer provided benefits provision in the consent judgment of divorce.

The Plaintiff estate claimed that a consent judgment of divorce was a contract. In that contract, the Defendant ex-husband knowingly and voluntarily waived his right to those proceeds. The Defendant ex-husband, in relying on *Egelhoff v Egelhoff ex rel. Breiner*, 532 US 141, 121 S Ct 1322, 149 L Ed2d 264 (2001), argued that the provisions of ERISA trumped the provisions of the consent judgment of divorce.

In *Egelhoff*, the United States Supreme Court held that a state statute providing for the automatic revocation upon divorce of a designation of a spouse as the beneficiary of a nonprobate asset, was preempted by ERISA. Id at 146. The court relied on ERISA's preemption section, 29 U.S.C. § 1144(a)[4]. It provides for ERISA's supersession of any state laws relating to a plan covered by ERISA, the Court found that the state statute had an impermissible connection with ERISA. The impermissible connection arose from two factors. The first factor was that the statute governed the payment of plan benefits. It bound administrators to pay benefits to beneficiaries chosen by state law as opposed to the plan documents.[5] *Id*. The second factor was the statute's interference with ERISA's attempt to create national uniformity in plan administration. The statute required plan administrators to familiarize themselves with states' statutes to determine whether a named beneficiary's status was revoked by law. This was a burden ERISA's preemption intended to avoid. *Id* at 149-150.

At first glance, *Egelhoff* may appear to close the door on the Plaintiff estate's argument in *MacInnes*. However, the Michigan Court of Appeals found that preemption was not the determinative issue. Instead, waiver was the issue. *MacInnes, supra* at 287. Agreeing with the majority view of the federal circuits[6], the court found that although ERISA preempted state law with respect to the designation of beneficiaries, ERISA does not preempt an explicit waiver

of interest by a beneficiary. *Id* at 287. The *MacInnes* court went on to hold that the consent judgment of divorce was in the nature of a contract and by the language of the life insurance provision, the Defendant ex-husband waived his right to the proceeds. *Id* at 289-290.

In a later case, *Moore v Moore*, 266 Mich App 96, 700 NW2d 414 (2005), the Michigan Court of Appeals was faced with a similar issue and once again held that preemption was not the issue and that there was a waiver of benefits. *Id* at 101-103. The *Moore* case pointed out an important factor that may not have been entirely clear in *MacInnes*. In *Moore*, when analyzing the issue of preemption, the court noted that in *Egelhoff*, the argument was that the plan administrator should have paid the funds to someone other than the designated beneficiary. *Id* at 101. However, in *MacInnes* and *Moore*, the argument was that the ex-spouses, having already been paid the funds by the plan administrator, should not be entitled to retain them. *Id*. In essence, the factors that caused an impermissible connection to ERISA in *Egelhoff,* were not present in *MacInnes* and *Moore*.[7] In *Sweebe v Sweebe*, 474 Mich 151, 712 NW2d 708, the Michigan Supreme Court ruled on this issue upholding the reasoning and decisions of the prior case law.

So in Michigan[8], your client can prevail in a suit against the ex-spouse for the proceeds when the claim is based in contract and waiver under a consent Judgment of Divorce. However, since the plan administrator cannot be forced to pay out the proceeds based upon the waiver provisions of the Judgment, you have to ensure that the claim clearly states the ex-spouse is not entitled to *keep* any proceeds as opposed to *receive* them (i.e., the claim should make it clear that it is based upon a state law cause of action). Finally, to make all your work worthwhile in the end, if the proceeds were recently paid out, you should immediately petition the court to enjoin the ex-spouse from spending them.

Endnotes

1. 29 U.S.C. § 1104(a)(1)(D) and § 1002(8).

2. MCR 3.211(B)(1) provides that a judgment of divorce, separate maintenance or annulment must include insurance and dower provisions required by M.C.L. § 552.10 and (2) a determination of the rights of the parties in pension, annuity and retirement benefits, as required by M.C.L. § 552.101(4).

3. M.C.L. § 552.101(2)-(4) require that all divorce judgments contain a provision determining the rights of the divorcing spouse to the proceeds of any life insurance policy, annuity, endowment, pension or retirement plan owned by the other.

4. 29 U.S.C. § 1144(a).

5. This, the Court determined, ran counter to sections of ERISA which require the plan to specify the basis on which payments are made (29 U.S.C. § 1102(b)(4)), the fiduciary to administer the plan in accordance with the plan documents (29 U.S.C. § 1104(a)(1)(D)) and to make the payments to beneficiaries designated by the plan (29 U.S.C. § 1002(8)). *Egelhoff, supra* at 146.

6. The MacInnes court stated that state courts are not bound by a federal court's holding on a federal question if the United States Supreme Court has not decided the issue and a conflict exists among the federal circuits. In that case, a state court is free to choose the view it determines the most appropriate. *MacInnes v Rowley*, 260 Mich App 280, 286, 677 NW2d 889 (2004) (citing *Etefia v Credit Technologies, Inc.*, 245 Mich App 466, 628 NW2d 577 (2001); *Schueler v Weintrob*, 360 Mich 621, 105 NW2d 42 (1960)).

7. Also see *Massachusetts Indem & Life Ins. Co. v Thomas,* 206 Mich App 265, 520 NW2d 708 (1994) and an unpublished decision *Pruchno v Pruchno*, Not Reported in NW2d, 2004 WL 1533854 (Mich App), 33 Employee Benefits Cas. 2721. The *Pruchno* court even dismissed the anti-alienation provision argument. The decedent and his spouse executed a postnuptial agreement which stated that the decedent's children from a former marriage would equally share 50% of his pension benefits. The decedent's spouse argued this was in contravention of 29 U.S.C. § 1056(d)(1) which states "pension plan" benefits "may not be assigned or alienated." The Pruchno court again stated that there was no argument that the postnuptial agreement was enforceable against the plan nor were the children seeking to have the plan pay them directly and thus, this argument failed as well.

8. Other states follow the minority rule also followed by the 6th Circuit which has held that a common law waiver cannot override the designation of a named beneficiary under ERISA. See *Metropolitan Life Ins. Co. v. Pressley*, 82 F3d 126, 129-130 (6th Cir. 1996); *McMillan v. Parrott,* 913 F2d 310 (6th Cir. 1990); *Lewkowicz v Lewkowicz*, 761 F Supp 48 (ED Mich. 1991). However, in *Brown Ex Rel. Estate of Sanger v. Wright*, 511 FSupp2d 850 (ED Mich. 2007), the court distinguished these cases stating that when the issue is whether a designated beneficiary is entitled to keep the proceeds based on a state law claim there is no preemption. *Id* at 853.