

WHAT HAPPENS TO BENEFICIARY DESIGNATIONS AT STATUS DISSOLUTION?

WHAT TOOLS SECURE BENEFICIARY AND SURVIVOR STATUS AS CONDITIONS UNDER FC §2337

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STATUS TERMINATION - 4 ASSETS

1. IRA account at Schwab (rollover) \$400,000
2. State Teachers Retirement (age 56)
3. Wells Fargo Bank Retirement Plans (age 58)
 - a. 401(k)
 - b. Pension Plan
 - c. Non-qualified Plans (3)
4. Life Insurance
 - a. \$1 million thru Wells Fargo (Employer provided)
 - b. \$500,000 through Met Life (not through employment)

SPOTLIGHTS FOR EXAMINATION

- a. ATROS
- b. PROBATE CODE §5600
- c. *Marriage of Egelhoff* (2001) 532 US 141 (Ex spouse still named as beneficiary gets the life insurance and 401(k) Plan proceeds. ERISA preempts Washington state statute which held that spousal beneficiary designation is automatically revoked for ERISA covered life insurance and retirement plan.)
- d. *Boggs v Boggs* (1997) 520 US 833 - ERISA preempts state statute by which deceased wife's share (intact marriage) to children. Preemption also removed any basis for the children to sue the designated beneficiary under the Plan for the proceeds.
- e. *Branco v UFCW-N. Cal. Employers Joint Pension Plan* (9th Cir 2002) 279 F3d 1154 (ERISA preempted state community property law permitting former wife's interest in husband's pension benefits to pass to her heirs when she predeceased him; her pension benefit share reverted to husband under plan; after her death, divorce order no longer a valid QDRO.)

NOTICE against **theft** or **dropping** of benefit

1. IRA - need restraining order or Transfer Order
 - a. Joinder? Not relevant since IRA is not a "plan"
 - b. TRO? Yes under CA Rules of Ct 1213.¹
 - c. Transfer Order of Spousal Interest - yes, under IRC 408(d)(6)

¹ California Rule of Court 1213 provides that the court may grant injunctive relief against a person who is acting as a trustee, agent, custodian, or similar fiduciary with respect to any property subject to disposition by the court in a marital dissolution proceeding. There is no requirement of joinder for injunctive relief under such circumstances. *Schnabel v. Superior Court* (1993) 21 Cal App4th 548 at 552.

2. State Teacher's Retirement System
 - a. Joinder and/or Claim of Interest FC 755 necessary to freeze any payments to the participant.
 - b. But one-time death benefit will be revoked under PC §5600 unless court order states otherwise.
3. Wells Fargo Retirement Plans
 - a. Joinder - not to Wells Fargo Company Plans
 - i. WFC Plans will reject Joinder. Department of Labor publication states California's Joinder is pre-empted for ERISA-plans; intent of joinder is to freeze benefits; freezing the benefit depends on QDRO Procedures.
 - ii. Get Plan's QDRO Procedures and do what is necessary to freeze the benefit or, prepare the QDRO NOW.
 - b. TRO - may be useful but QDRO NOW would make other stopgaps unnecessary.
4. Life Insurance
 - a. ATROS FC 2040 important here. Probate Code §5600 specifically does not revoke beneficiaries to life insurance. (But query whether it is necessary to maintain all life insurance in favor of former spouse)
 - b. Wells Fargo - (Employer provided life insurance not likely to be dropped but query whether "all" is necessary to cover former spouse)
 - c. Private Insurances
 - i. Give Notice of Interest to Provider under FC §§ 2050,
 - ii. Send Order to Provider under FC § 2051

ORDERS against Death of Employee pending Judgment?

1. **IRA at Charles Schwab (rollover) \$400,000**
 - a. ATROS - perhaps irrelevant in the face of Probate Code §5600. Secure beneficiary designation between Bifurcation and Judgment Dividing Property
 - b. **PROBATE CODE § 5600 - BEWARE!!! Automatic revocation of beneficiary designation applies**
 - i. SOLUTION - TRO, or
 - ii. Divide at bifurcation IRC §408(d)(6) - Suggested language based on statute: **"This stipulation is made incident to a divorce instrument, per subparagraph (A) of Internal Revenue Code section 71(b)(2). The IRA transfer to Wife provided for herein is intended to be without immediate tax consequence to either party, pursuant to IRC Section 408(d)(6)."**
2. **STATE TEACHERS RETIREMENT SYSTEM - EFFECT OF TEACHER'S DEATH** between Bifurcation and Property Judgment
 - a. **One Time Death Benefit** (\$24,652) - lost to ex-spouse under Probate Code §5600 without a court order.
 1. See- pp. 11-12 STRS Community Property Information Booklet, 2004.
 2. Solution: Use FC §2337 order to maintain beneficiary status.
 - a. Non-employee spouse to be maintained as beneficiary of Death Benefit (or some portion) notwithstanding PC §5600.
 - b. And file a new beneficiary form as plan requests (required by Plan but not by PC §5600 where court order is sufficient), or
 - c. Divide asset now by court Order
 - b. **Survivor Option:**

0. If the STRS order will be a shared account, a survivor option may be elected at the teacher's age 55. (If the teacher were old enough to have already elected a survivor option, that option election is nullified by marital status termination under Educ Code §23300 and must be restated in the judgment.
1. Pre-retirement survivor option available at teacher's age 55
 - a. Cheaper for life if elected early
 - b. Alternatives are return of contributions or separate account for nonemployee if employee dies pre-retirement
2. Need an order TO REQUIRE election of survivor option at teacher's age 55.
3. **WELLS FARGO 401(k) PLAN** - at status dissolution, what protects beneficiary status for former spouse if such is intended? a QDRO
 - a. HOW DOES A STATUS DISSOLUTION PRESENT A DANGER OF LOSS TO THE NONEMPLOYEE CLIENT?
 0. Beneficiary can change
 - a. By remarriage (automatic)
 - b. By new designation
 - c. By Waiver in Judgment
 - b. HOW DO YOU SECURE THE FORMER SPOUSE AS A BENEFICIARY UNDER THE PLAN AT STATUS TERMINATION?
 - . **ATROS** ?? probably ineffective - under *Egelhoff* the designed beneficiary gets the benefit.
 - i. **Promises? Not if Participant remarries.** At Participant's remarriage automatic spousal beneficiary rights (50% or 100%) and automatic trumps designated beneficiary rights.
 1. **BOGGS** - no constructive or resulting trust remedy against actual beneficiary if your claim is based on an interest that is preempted by the Plan terms (i.e., automatic beneficiary trumps designation)..
 - c. SOLUTION - 401(k) QDRO at the time of the Judgment (FC §2337(6))
 - . If temporary QDRO - how much is the awarded %?
 - . If 100%, freezes benefit until permanent order - adjust final estate allocation to take award into consideration re overall estate
 - a. If 50% to a current spouse.- Ok if ex-spouse remains an eligible beneficiary for the other 50% until QDRO.
 - i. Reasons to make QDRO Permanent:
 - . But beware of effect of delay -
 - i. 1st come 1st served
 - ii. rights of subsequent spouse
 - iii. Creditor Effect - ex: *IRMO Marshall* (1995) 36 Cal.App.4th 1170-
 - iv. IRA liens may trump QDRO due to timing.
 - a. May give a deceased Alternate Payee an opportunity to have a beneficiary. This does not work if QDRO drafted as a shared interest. See., e.g., *BRANCO v. UFCW-NORTHERN CALIFORNIA EMPLOYERS JOINT PENSION PLAN* , 27 EBC 1648, 279 F.3d 1154 , 2002 WL 200910
 - b. No investment control by nonemployee without a QDRO.
 - i. Most profit sharing plans (including 401(k) plans) and a few Money Purchase Plans are participant directed.
 - ii. Fiduciary obligations under state law arguably do not include prudent investor rule.

- iii. Participant spouse and Non-participant spouse often have different investment risk tolerance and objectives.

ii. ALTERNATIVE PROBLEM: INTEREST WAIVED IN JUDGMENT BUT EMPLOYEE FORGETS TO CHANGE BENEFICIARY DESIGNATION BEFORE DEATH

- 1. **EGELHOFF says Designated Beneficiary TRUMPS PROBATE CODE §5600** revocation; - must change beneficiary for real
- 2. **WAIVER** may trump Egelhoff effect.
 - a. Some federal circuit courts find state court judgments may amount to WAIVER in which case the spouse's WAIVER trumps a designation that still names the spouse. :
 - b. Waiver requires specific language. Some Cases: *Keen v. Weaver* (2003) 46 Tex.Sup.J. 804; *Melton v. Melton* (2003) 324 F.3d 941; *Brandon v. Travelers Ins. Co.* (1994) 18 F.3d 1321; *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown* (7th Cir, 1990) 897 F.2d 275
- b. **WELLS FARGO RETIREMENT (cash balance) PLAN -**
 - i. Defined benefit plan under ERISA has pre-retirement survivor annuity benefits, at a minimum.
 - ii. **QDRO NEEDED per IRC 414(p)**
 - 1. Need Pre-retirement Survivor Annuity Protection in QDRO at Disso
 - a. Protect against effect of remarriage - e.g., *Hopkins v. A.T.&T. Global Information Solutions Co.* (4th Cir. 1997) 105 F.3d 153, 156 (order that attempts to give former spouse interest in QJSA survivor annuity cannot be a QDRO because right has vested in participant's second spouse and is no longer payable "with respect to a participant"); see 29 U.S.C. § 1056(d)(3)(B)(i)(I)
 - b. Protect against death of participant - see *Rivers v. Central & South West Corp.*, 186 F.3d 681, 683 84 (5th Cir. 1999); *Samaroo v. Samaroo* (3d Cir. 1999) 193 F.3d 185 (nunc pro tunc amendment of divorce decree after participant's death to divide QPSA is not valid QDRO).; *but see Trustees of Dir. Guild of Am.-Producer Pension Ben. Plans v. Tise* (9th Cir., 2000) 234 F.3d 415, 424e)
 - 2. QDRO is required under FC §2337(6)B. Include a division of plan interests in the Judgment and serve on the Plan. Even if faulty, should be sufficient to trigger application of QDRO procedures (which should allow for a preservation of the interest for at least 18 months. But read Plan QDRO Procedures for any special rules).
 - ii. **WELLS FARGO NONQUALIFIED PLANS**
 - . **PROBATE CODE §5600 - effective to revoke beneficiary designation of former spouse? maybe, unless court orders otherwise. May need to "redesignate" ex-spouse as beneficiary if that is the intent.**
 - i. **EGELHOFF does not control. Beneficiary Designation Order may work if Plan permits other than a current spouse beneficiary designation.**
 - ii. **IRS allows non-qualified plans to pay an Alternate Payee directly (See Rev. Rul. 2004-60) Wells Fargo Non-qualified plans do not allow a court order to this effect. Use Constructive Trust or buyout.**

2. LIFE INSURANCE

a. LIFE INSURANCE THROUGH EMPLOYMENT -

PROBATE CODE 5600? Does not apply by specific exclusion of life insurance. (Our PC §5600 was adopted October 1, 2001 after the *Egelhoff* decision March 2001.)

- b. **QDRO for life insurance?** QDRO held to be effective to overcome designated beneficiary. See *Smith v. Estate of Mark Smith* (2003) United States District Court for the District of New Jersey (No. 99-5973); *Metropolitan Life Insurance Company v. Bigelow* (2002) United States Court of Appeals, Second Circuit, 283 F.3d 436; *Seaman v. Johnson* (1/7/02) United States District Court, E.D. Michigan, Southern Division; *Central States v. Howell* (2000) 6th Circuit 227 F.3d 672; *Metropolitan Life Insurance Co. v. Marsh* (1997) U.S. Ct. of Appeal, 6th Circuit, 119 F.3d 415 [21 EBC 1341]; *Bass v. Mid-America Co. Inc.* (1995) United States District Court for the Northern District of Illinois, Eastern Division (No. 95C1167); *Metropolitan Life Insurance Company v. Wheaton* (1994) U. S. Ct of Appeals for the 7th Circuit 42 F.3d 1080; and *Carland v. Metropolitan Life Insurance Co.* (1991) U.S. Ct of Appeals, 10th Circuit, 935 F.2d 1114 (13 EBC 2350).

c. LIFE INSURANCE (NOT EMPLOYER PROVIDED)

- . Should be subject to state law. Use Claim of Interest Notice in FC 2050
- i. Control beneficiary designation with a court order. Send order to provider with notice in FC 2051.