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## Third Circuit Weighs In On Retirement Benefits Administration In *McGowan*

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Any retirement plan administrator who has been asked to allocate or distribute a plan participant's benefits following such participant's dissolution of marriage has likely been faced with a myriad of issues concerning same. While federal law has attempted to facilitate the allocation of such retirement benefits through certain provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), which, for example, address the proper administration of a qualified domestic relations order ("QDRO"), plan administrators have also been faced with determining whether certain documents which are ancillary to the dissolution of a marriage, such as property settlement agreements, can properly assign a retirement benefits interest. Unfortunately for such administrators (and their legal counsel), a split of authority has occurred among the courts that have addressed this issue.

In general terms, two distinct premises have emerged from the cases which have addressed whether an ancillary agreement can govern the benefits rights of an individual.

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Decisions which have found that such an interest can be created through ancillary documents have generally indicated that as ERISA does not specifically preclude such an assignment, the courts may look to federal common law to determine whether to uphold an individual's benefits rights (or waiver thereof) under the terms of said agreement. An alternative view, which has been adopted by a minority of the courts that have addressed this issue, generally opines that as ERISA only permits the assignment of a participant's benefits interest in certain limited circumstances, and does not specifically permit such an assignment under the terms of a property settlement agreement, any such attempted assignment is invalid.

The Third Circuit Court of Appeals recently addressed such issues in *McGowan v. NJR Service Corp.* (2005 U.S. App. 19170 (3rd Cir. 2005)). James

McGowan, a participant in a defined benefit plan sponsored by New Jersey Natural Gas Company, elected to receive his accrued plan benefits in the form of a 50% joint and survivor annuity with his wife, Rosemary, shortly before his retirement in November, 1996. In 1998, and as part of their divorce proceedings, the couple entered into a property settlement agreement ("PSA"), which became part of their final divorce decree. In pertinent part, the PSA provided that Rosemary "waives any and all rights, title, interest or claims to...the New Jersey Gas Company Employee Pension Plan of [James McGowan]." Following the finalization of their divorce, James McGowan sought to change the survivor beneficiary designation of his interest in the plan to his former spouse from a prior marriage. The plan administrator denied the requested beneficiary designation change, citing a plan provision that prevented any change in a beneficiary designation once benefits distributions had commenced.

In November, 2001, Mr. McGowan remarried and sought to name his new spouse as beneficiary of his survivor benefits under the plan. Again, the plan administrator denied his request, maintaining the previously referenced plan provision prevented any such beneficiary change. After exhausting his administrative remedies, Mr. McGowan filed suit in the federal district court for the District of New Jersey seeking to enforce his intended beneficiary designation. Following a grant of summary judgment for the plan administrator, Mr. McGowan filed an appeal with the Third Circuit Court of Appeals.

In affirming the District Court decision, the Appellate Court noted that while the issue as to whether a plan administrator is required to recognize an ancillary waiver of a former spouse's interest in a retire-

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ment plan is an issue of first impression in the Third Circuit, a split of authority exists among the Circuit Courts that have addressed this issue. As articulated by the Court, the courts which have permitted such documents to be controlling have opined that ERISA does not specifically address the issue of a waiver of benefits, and therefore federal common law should be determinative as to whether, and under what circumstances, a waiver of plan benefits will be valid. The Court stated that under federal common law, such a waiver will only be valid if “upon reading the language in the divorce decree, a reasonable person would have understood that she was waiving her beneficiary interest” (citing *Clift v. Clift* (210 F.3d 268, 5th Cir. 2000)). Accordingly, the Court concluded, a plan administrator faced with such circumstances will need to determine whether any such ancillary agreements were “(1) voluntarily entered into, (2) in good faith, and (3) sufficient enough that a ‘reasonable person’ would see them as valid waivers.”

In adopting an alternative position, the Court rejected the assertion that ERISA does not address these ancillary waiver arrangements. Rather, the Court noted that ERISA §1104(a)(1)(D) specifically requires a plan administrator, as a fiduciary of the plan, to discharge his duties “in accordance with the documents and instruments governing the plan.” The Court therefore found that ERISA “dictates that it is the documents on file with the Plan, and not outside private agreements between beneficiaries and participants, that determine the rights of the parties.” Because Mr. McGowan relied upon the terms of the PSA as a valid waiver of his former spouse’s interest in the plan, and did not seek to obtain a QDRO, the Court concluded that “federal common law should simply have no place in our analysis.”

In rendering its opinion, the Court also opined that the recognition of the PSA as a waiver of Mrs. McGowan’s benefits interest under the plan would violate the anti-alienation provisions of ERISA §206(d)(1), which generally prohibit the assignment or alienation of benefits from a qualified retirement plan absent an exception to this general rule (such as under the terms of a QDRO). The Court noted that a waiver is not technically an assignment or alienation, as the latter concepts involve an affirmative transfer of benefits to another person, while a waiver generally

involves only the refusal of benefits by an individual entitled to receive same. However, in the view of the Court, McGowan “seeks to use the concept of waiver in order to effectuate what is the functional equivalent of an assignment of benefits from his former wife to his current wife.” The Court determined that the purported waiver created an “indirect arrangement” by which McGowan’s new wife would obtain an “interest enforceable against the plan,” thereby constituting an assignment or alienation of benefits. In the Court’s opinion, as Congress has set forth specific requirements concerning the administration of QDROs, the use of a waiver to determine an entitlement to benefits would be “inconsistent with this comprehensive scheme” (citing *Boggs v. Boggs*, 520 U.S. 833 (1997)).

While not dispositive, the *McGowan* decision is important to both plan administrators and benefits practitioners alike, particularly those within the jurisdictional purview of the Third Circuit. In restricting the documents that a plan administrator may properly review following the dissolution of a plan participant’s marriage, and the potential impact of same upon such participant’s retirement benefits, the Court has added increased certainty to this administrative process, which should reduce the administrative burden and cost associated with such determinations. Such additional guidance may also assist plan administrators in the discharge of their fiduciary duties, thereby reducing the potential litigation claims of both plan participants and their respective (or potential) beneficiaries.

In addition, and as briefly referenced by the Court, the *McGowan* decision comports with the policy concerns articulated by the United States Supreme Court in *Egelhoff v. Egelhoff* (532 U.S. 141 (2001)) regarding the administration of retirement benefits rights following a dissolution of marriage. In *Egelhoff*, the U.S. Supreme Court determined that ERISA pre-empted a state statute which provided that a spousal beneficiary designation applicable to a non-probate asset was automatically revoked upon dissolution of the marriage, to the extent such beneficiary designation concerned a retirement plan subject to ERISA. In rendering its decision, the Supreme Court indicated that ERISA is intended to provide for “nationally uniform plan administration” which provides for “set standard procedures to guide processing of claims and disbursement of

benefits.” By providing that benefits rights must be determined solely by the documents on file with the underlying retirement plan, the *McGowan* decision furthers the concept of a “nationally uniform plan administration” scheme, thereby potentially reducing the administrative costs associated with retirement plans while providing additional protection to plan administrators in the discharge of their fiduciary duties.

In addition to being aware of its holdings, plan administrators should view the *McGowan* decision as an opportunity to review their current administrative practices concerning the handling of issues such as beneficiary designation change requests and the processing of domestic relations orders, and make any changes necessary to facilitate the administration of same. Such items may include:

1. *Review current administrative procedures.* As reflected in *McGowan*, a plan administrator may be called upon to provide support for his or her decisions regarding an individual’s retirement benefits rights. Upon such an occurrence, it is critical that the plan administrator be able to demonstrate that all appropriate procedures were followed in determining each party’s interest (or lack thereof) in the participant’s plan benefits. Plan administrators should have a detailed written policy addressing the administration of any such claims, and should document the steps taken to ensure compliance with same.

2. *Update plan information and communications.* A key to effective retirement plan administration is informing plan participants of the plan’s provisions and administrative processes. Plan administrators should periodically review all written communications and materials distributed to plan participants to ensure that they are complete and accurate. In addition, plan administrators should inform participants of the circumstances under which a QDRO will be required for certain benefits allocations and related changes.

3. *Provide sample QDROs to participants.* To facilitate the administration of same, and so as to encourage the use of a QDRO, plan administrators should consider the preparation of sample QDROs to be used by plan participants in assigning a portion of their interest under the plan. If sample QDROs are prepared by the plan administrator, participants should be informed of the availability of same in the appropriate plan materials.