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The Practitioner Family Law

'Boggs' Boggle

Pension-Benefit Division Under ERISA

By Mitchell A. Jacobs and David Marcus

Boggs v. Boggs, 117 S.Ct. 1754 (1997), resolved a conflict between the 5th and 9th U.S. Circuit Courts of Appeals concerning whether a deceased spouse may will her community property interest in pension benefits. In a case out of the 5th Circuit (Louisiana), the Supreme Court held that the federal Employee Retirement Income Security Act, which does not allow the transfer, pre-empts state law that would have allowed the transfer. The court reversed the 5th Circuit. Previously, the 9th Circuit in *Ablamis v. Roper*, 937 F.2d 1450 (1991), had also ruled that ERISA pre-empts state law.

In *Boggs*, the husband had earned approximately $150,000 in retirement benefits from his employer's savings plan, which were rolled over into an IRA; 96 shares of AT&T stock; and a monthly annuity payment from a defined benefit retirement plan. A portion of these benefits, earned during a marriage that produced three sons, were paid to the husband after the wife's death.

The husband later remarried. During retirement, he received monthly annuity payments from the defined benefit plan. At his death, no money was withdrawn from the IRA account containing the savings plan rollover. The surviving spouse received monthly annuity payments from the defined benefit plan, known as the survivor annuity.

Meanwhile, the first wife's will had left to the husband a lifetime usufruct, "the rough equivalent of a common-law life estate," *Boggs*, 117 S.Ct. at 1755, in two-thirds of her estate. The will provided that at the husband's death, her children were to receive that portion.

The Louisiana state court issued an order in 1980 determining the first wife's community-property interest in the savings plan. It was undisputed that the will was enforceable under Louisiana law. The 5th Circuit case concerned whether the sons, or the surviving spouse, had the right to the first wife's community property portion of the husband's retirement benefits.

With respect to the monthly annuity benefits, the court reasoned that ERISA required the annuity to be in the form of a "qualified joint-and-survivor annuity." This means that if the husband died while married, his surviving spouse must receive an annuity in the amount of at least 50 percent of the monthly amount. ERISA provides that the employee can only waive this survivor annuity if his current spouse "consents in writing to the designation of another beneficiary, which designation also cannot be changed without further spousal consent, witnessed by a plan representative or notary public." *Boggs*, 117 S.Ct. at 1761.

Since the surviving spouse in *Boggs* had not waived her annuity right or consented to have the sons designated the beneficiaries, she must receive the annuity.

The sons argued that ERISA only requires the plan to pay the monthly benefits to the surviving spouse. ERISA does not prohibit a court from ordering the spouse, in turn, to pay the money to them. The court rejected this argument, holding that one of ERISA's purposes is to guarantee income to surviving spouses. This purpose would obviously be defeated by the son's proposal. Thus, in the face of a conflict between ERISA and state law, ERISA wins.

Regarding the other retirement benefits, the court also held that ERISA pre-empted state law. The court reviewed ERISA in detail and concluded the act provides that, except for limited circumstances, benefits are only paid to "participants" or to "beneficiaries." "A participant is defined as an employee or former employee of an employer, or any member or former member of an employee organization, which is or may become eligible to receive benefits. ... A beneficiary is a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." Id. at 1764, citing 29 U.S.C. Section 1002(7) and (8). The sons were neither participants nor beneficiaries.

The court also heavily relied on ERISA's "anti-alienation" provision: "[E]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." Id. at 1765, citing 29 U.S.C. Section 1056(d)(1). This provision prevents the transfer of the benefits to the sons, since such transfer would result in an assignment or alienation of the benefits.

The only exception to the anti-alienation provision that allows benefits to be paid to nonemployees because of their marital or dependent status is found in ERISA's qualified domestic-relations order (QDRO) provisions. These rules allow payments for "the provision of child support, alimony payments, or marital-property rights to a spouse, former spouse, child or other dependent of a participant." Id. at 1763, citing 29 U.S.C. Section 1056(d)(3)(B)(ii). Since there was no such order in this case, the benefits could not be assigned or alienated to the sons.

An amicus brief filed by the Estate Planning, Trust and Probate Law Section of the State Bar of California argued that the QDRO provisions apply only in divorce proceedings; they do not evidence congressional intent that ERISA pre-empt state law concerning testamentary transfers. The court responded by stating that ERISA has only two exceptions to the anti-alienation rule — QDROs and certain loans by participants from the plan — and those exceptions are "not subject to judicial expansion." Id. at 1765.

Finally, the sons argued that "it is anomalous and unfair that a divorced spouse, as a result of a QDRO, will have more control over a portion of his or her spouse's pension benefits than a predeceasing spouse." Id. at 1767. The court responded that as between a living spouse and a deceased former spouse, ERISA is intended to provide benefits to the employee's surviving spouse and dependents. Moreover, the court stated, "the fairness of the distinction might be debated, but Congress has decided to favor the living over the dead and we must respect its policy." Id. at 1767.

Justices Stephen G. Breyer and Sandra Day O'Connor, joined in part by Chief Justice William H. Rehnquist and Justice Ruth Bader Ginsburg, dissented, arguing that there is no congressional intent that ERISA pre-empt state community-property, probate or property laws. Id. at 1770.

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The first wife's testamentary transfer, the dissent added, should be considered neither an alienation nor an assignment. She obtained her interest in benefits not through alienation or assignment, but through community-property laws. Furthermore, the purpose of the anti-alienation provision is to protect the employee's retirement benefits. Since the husband had died, he no longer needed the benefits. Thus, the sons could receive her interest without frustrating the purpose of the anti-alienation provision.

Since ERISA does not restrict how the husband could dispose of his portion of the benefits, the dissent went on, then why should ERISA be found to restrict how the first wife could dispose of her portion? Also, the will left to the sons only that amount of the benefits remaining after the husband's death. He had been free to spend the benefits as he saw fit. Thus, ERISA should not affect the disposition of the benefits that remain after his death.

The dissent also argued that the QDRO provisions do not prohibit a testamentary transfer since they apply only to alienation and assignments, and the first wife's right to the pension benefits was neither. Furthermore, the QDRO provisions apply only upon divorce, and not to wills. It is "anomalous," said the dissent, that Congress actually intended a divorcing spouse to have more control over the community-property portion of pension benefits than a spouse who is married until death.

Finally, the dissent agreed that the survivor-annuity provisions guaranteed that the surviving spouse receive the full surviving-spouse annuity. However, the sons should still receive their mother's community-property portion of the other community assets, i.e., the stock and saving plan money rolled over into the IRA.

If the dissent is correct, then *Boggs* should flush out the true congressional intent. Estate-planning attorneys will certainly struggle with this issue and try to find some way to protect a nondivorcing spouse's interest in pension benefits.

Even in a dissolution action, enforceability is not clear regarding the QDRO provision allowing the nonemployee spouse to designate a beneficiary if he dies before the employee spouse, and before benefits begin to be paid to an alternate payee.

Until the courts resolve this issue, the retirement plan should be contacted to determine if it will allow the nonemployee spouse to make such a beneficiary designation. Also, the nonemployee spouse may request that the employee spouse buy his interest in the pension benefits so that the nonemployee spouse has control over the disposition of that money at death.

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