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BENEFIT NEWS BRIEFS

Post-DOMA Court Finds Same-Sex Spouse Is "Surviving Spouse" Under 401(k) Plan

In the first same-sex surviving spouse case we are aware of since the U.S. Supreme Court invalidated Section 3 of the *Defense of Marriage Act (DOMA)* in *United States v. Windsor,* a federal district court held that the same-sex "spouse" of a deceased 401(k) plan participant should receive the plan's death benefit and not the decedent's parents. The case is *Cozen O'Connor vs. Tobits*, (E.D. Pa. 2013)(No. 11-0045). For background on *US v. Windsor*, see *Client Bulletin 2013-36.*

In *Cozen,* Jean Tobits was the surviving spouse in a marriage between her and Sarah Farley which took place in Canada, which recognized same-sex marriages at the time. The couple lived in Illinois until Farley's death. Tobits sought the plan's pre-retirement survivor annuity, as did Farley's parents. The plan interpleaded the matter in district court as there were competing claims to the monies. Per a plan venue provision, the case was brought in the Eastern District of Pennsylvania District Court.

In analyzing the matter, the district court found that the while the state of Illinois does not issue marriage licenses to same-sex couples, by virtue of its civil union statute; however, Illinois can recognize same-sex marriages solemnized in other jurisdictions, such as Canada. The district court took judicial notice of an Order by a Cook County Probate Court that declared Ms. Tobits a party to a civil union with Ms. Farley and declared her Ms. Farley's sole heir. The Cook County Probate Court accepted as valid the Canadian marriage between Ms. Tobits and Ms. Farley:

> Post-*Windsor*, where a state recognizes a party as a "Surviving Spouse," the federal government must do the same with respect to ERISA benefits—at least pursuant to the express language of the ERISA-qualified Plan at issue here. There can be no doubt that Illinois, the couple's place of domicile, would consider Ms. Tobits Ms. Farley's "Surviving Spouse"—indeed it already has made that specific finding under state law. *Windsor* makes clear that where a state has recognized a marriage as valid, the United States Constitution requires that the federal laws and regulations of this country acknowledge that marriage. In light

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> of that, this Court finds that Ms. Tobits is Ms. Farley's "Spouse" pursuant to the terms of the Plan.

Thus, even though the plan was headquartered in Pennsylvania, which does not recognize same-sex marriages, since the place of domicile of the parties (Illinois) recognized same-sex marriages, Ms. Tobits was a "spouse" under the plan under *ERISA.* The district court held any contrary Pennsylvania law was preempted by *ERISA*, noting as follows:

> The Court need not decide any issues of Pennsylvania state law in this matter, including that of the constitutionality of Pennsylvania's state DOMA statute. Although the Plan contains a choice of law provision that makes reference to Pennsylvania law, by the Plan's terms, Pennsylvania law is only applicable to the extent it is not pre-empted by ERISA. Here, the Court finds that, based on the terms of this Plan, ERISA pre-empts Pennsylvania law entirely.
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> That this Plan belongs to a company headquartered in Pennsylvania matters not. The issue here regards the definition of "Spouse" as supplied by ERISA—a federal regulation. For the purposes of determining the definition of "Spouse," if Courts were required to look at the state in which the policy was drafted, this could permit Plan administrators and drafters to forum shop among those jurisdictions with state DOMA statutes, in an effort to avoid providing benefits to same-sex couples with otherwise valid marriages. At its heart, ERISA was enacted to establish national uniformity among benefit plans. 120 CONG. REC. 29,197 (1974) ("With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation."); *see also Aetna Health Inc. v. Davila,* 542 U.S. 200, 208, (2004). Today's decision is consistent with that goal.

No doubt we will soon have a case where the deceased may have been married in a state that recognizes same-sex marriages but died in a state that does not recognize them. Then, the matter will resolve down to which rules "place of celebration of the marriage" or "place of domicile at death". Hopefully, the DOL/IRS will issue guidance to clarify matters for plan sponsors.

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