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Two Federal Courts Recognize Same-Sex Spousal Rights in States Not Permitting Same-Sex Marriage

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TO: PENSION MEMBERS No. 40-13
BANK, TRUST AND RETIREMENT ADVISORY COMMITTEE No. 24-13
OPERATIONS COMMITTEE No. 40-13
TRANSFER AGENT ADVISORY COMMITTEE No. 63-13 RE: TWO FEDERAL COURTS RECOGNIZE SAME-SEX SPOUSAL RIGHTS IN STATES NOT PERMITTING SAME-SEX MARRIAGE

Subsequent to the Supreme Court's recent decision in United States v. Windsor, [1] two federal district courts have issued decisions recognizing same-sex spousal rights in states that do not recognize same-sex marriage. As you may recall, in Windsor, the Court did not address Section 2 of the Defense of Marriage Act (DOMA) as it was not at issue in the case. DOMA Section 2 provides that no state shall be required to recognize as a marriage any relationship between persons of the same sex that is treated as a marriage by another state. The Court's failure to consider the implications of DOMA Section 2 left unresolved that question of how a plan's spousal benefits will be affected if same-sex couples who live in a state that does not recognize same-sex marriage were married earlier or get married in the future in a state that does recognize same-sex marriage. These more recent federal district court cases offer some guidance as to how courts will adjudicate this issue.

Obergefell v. Kasich

In Obergefell v. Kasich, the U.S. District Court for the Southern District of Ohio ruled that Ohio, which has a state constitutional amendment banning the recognition of same-sex marriage licenses issued in other states, must recognize the valid same-sex marriage license of a couple married in Maryland. [2] In this case, two male Ohio residents, John Arthur and James Obergefell, traveled to Maryland to enter into a legal same-sex marriage. Mr. Arthur was in the late stages of a terminal illness at the time of the marriage. The plaintiffs sought an injunctive order declaring unconstitutional Ohio's law forbidding recognition of legal same-sex marriages from other states and requiring the Registrar of Ohio death certificates to record Mr. Arthur as "married" and to record Mr. Obergefell as his surviving spouse upon Mr. Arthur's death.

The court stated that "[w]hile the holding in Windsor is ostensibly limited to a finding that the federal government cannot refuse to recognize state laws authorizing same sex marriage, the issue whether States can refuse to recognize out-of-state same sex marriages is now surely headed to the fore." In its ruling, the court found that "[t]hroughout its history, Ohio law has been clear: a marriage solemnized outside of Ohio is valid in Ohio if valid where solemnized." Finding that Ohio recognizes lawful out-of-state marriages of first cousins and marriages of minors, despite Ohio's refusal to authorize such marriages, the court ruled that by treating same-sex marriages differently, Ohio law likely violates the U.S. Constitution's Equal Protection Clause. The court therefore ordered the Ohio Registrar of death certificates not to accept for recording a death certificate for Mr. Arthur that does not record his status as "married" and/or does not record Mr. Obergefell as his surviving spouse.

Cozen O'Connor v. Tobits

Cozen O'Connor v. Tobits involved the application of the Windsor decision to an ERISA governed pension plan. In Tobits, the U.S. District Court for the Eastern District of Pennsylvania appears to have endorsed a "domicile" rule, as the court focused on the law relating to same-sex marriage in Illinois (where the couple lived), in ruling that spousal death benefits in an employer's profit sharing plan were payable to the deceased employee's surviving same-sex spouse rather than to the employee's parents. [3]

By way of background, Sarah Farley worked in the Chicago office of Cozen O'Connor, a Philadelphia based law firm, and was a participant in the Cozen O'Connor Profit Sharing Plan (the Plan). In 2006, Ms. Farley legally married Jean Tobits in Canada and after their marriage they resided in Illinois. Ms. Farley was later diagnosed with cancer and she died in 2010. Under the terms of the Plan (and in accordance with ERISA and the Internal Revenue Code) if a Plan participant was married at the time of her death, the Plan was required to provide her surviving spouse with a qualified pre-retirement survivor annuity (QPSA). Ms. Tobits requested payment of the QPSA from the Plan as Ms. Farley's surviving spouse. Ms. Farley's parents also made a claim for the QPSA, claiming that Ms. Farley had named them as her beneficiaries and arguing that DOMA prevented the Plan from recognizing the deceased employee's same-sex spouse, despite the fact that the couple was legally married in Canada in 2006. [4] Although the court was provided with a notarized copy of Ms. Farley's Designation of Beneficiary Form listing her parents as her primary beneficiaries, the court found that Ms. Tobits did not waive her rights to the QPSA by signing the Designation of Beneficiary Form. Therefore, the case focused on whether Ms. Tobits qualified as a "spouse" under the Plan and was entitled to the QPSA.

In its decision, the court reviewed the Plan's terms and noted that the term "spouse" was defined only as "the person to whom the participant has been married throughout the one-year period ending on the earlier of (1) the participant's annuity starting date; or (2) the date of the participant's death." The court found that the Plan's definition of "spouse," which tracks the ERISA mandates regarding spousal benefits, still leaves open the question of exactly who can be a spouse. [5] Further, the court found that the Plan expressly required that it is to be construed according to ERISA and the Code. Because the Plan did not, within its definition of "spouse," address whether a same-sex married individual could be considered a "spouse," the court determined it must look to ERISA and the Internal Revenue Code "to supply meanings to the Plan not otherwise found therein…" In doing so, the court discussed the impact of the Windsor opinion, noting that DOMA, which amended the definition of "spouse" in the federal Dictionary Act, meant that "for purposes of ERISA, the Code and thousands of other regulations, DOMA, by operation of Section 3, restricted

any reference to “Spouse” to mean only opposite-sex spouses.” The court concluded that, as result of the Windsor decision, the term “spouse” as used in the Plan was not unconstitutionally restricted to members of the opposite-sex, but includes same-sex spouses of valid marriages. Further, the court determined that Ms. Farley and Ms. Windsor were deemed to be validly married in Illinois because, although Illinois does not issue licenses for same-sex marriages, by virtue of its civil union statute, it does recognize same-sex marriages solemnized in other jurisdictions, such as Canada. As a result, the court held that Ms. Tobits was Ms. Farley’s spouse pursuant to the terms of the Plan and entitled to the QPSA.

Notably, the court ignored the Plan’s choice of law provision, which provided that Pennsylvania law governed to the extent it was not preempted by ERISA. In a footnote, the court noted that it need not decide any issues of Pennsylvania law in the case or the constitutionality of Pennsylvania’s state DOMA statute, because under the Plan terms, ERISA preempts Pennsylvania law entirely. [6] Based on the court’s analysis, it is unclear whether its holding would have been different if the term “spouse” was defined more specifically in the Plan (for example, as only an opposite-sex spouse), and whether the court would have then looked to Pennsylvania law, which prohibits both same-sex marriages and civil unions. Further, we note that the decision is binding precedent only in the Eastern District of Pennsylvania.

We will continue to update you on post-Windsor developments as we await regulatory guidance.

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endnotes

[1] For the Institute’s Memorandum on the impact of United States v. Windsor on retirement plans, see Memorandum to Pension Members No. 31-13, Bank, Trust and Retirement Advisory Committee No. 20-13, Operations Committee No. 32-13, Transfer Agent Advisory Committee No. 54-13 [27337], dated July 16, 2013.

[2] A copy of the court’s decision is available here: http://sblog.s3.amazonaws.com/wp-content/uploads/2013/07/Judge-Black-ruling-on-marriage-7-22.pdf.

[3] A copy of the courts’ decision is available here: http://www.nclrights.org/site/DocServer/Tobits_decision.pdf.

[4] Cozen O’Connor filed an interpleader action in the Eastern District of Pennsylvania asking the court to determine who was entitled to the benefits.

[5] In a footnote, the court stated that “ERISA and the Code merely establish a floor for privately sponsored employee benefit plans with respect to spousal benefits. Privately-sponsored plans have discretion to go beyond these requirements – indeed many do. Today’s holding makes it clear however, that Windsor leveled the floor.”

[6] The court further noted that the issue in the case is the definition of “spouse” under ERISA – a federal regulation. As such, the court stated that for the purposes of determining

the definition of “spouse,” if courts were required to look at the state in which the plan 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 – a result inconsistent with ERISA’s goal of establishing national uniformity among benefit plans.
