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MAY 2015 NEWSLETTER

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Congratulations to Attorney Judy Bae who was selected by San Diego Business Journal as "Best of the Bar 2015"!

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AREAS OF PRACTICE: Probate, Trust Litigation
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COMMENTS: Prior to law school I attended medical school, which has been an essential part of my success in understanding the emotional and psychological components that often result in probate/trust litigation matters.
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IN THIS ISSUE

IMPORTANCE OF BENEFICIARY DESIGNATION FORMS- OR NOT

By Bradford N. Dewan, J.D.

Individual Retirement Accounts ("IRAs") and qualified pension plans are often referred to as "non-probate" assets. This term, non-probate asset, is used with respect to IRAs and qualified pension plans because the recipient(s) of the assets (i.e., the beneficiary) of the IRA or qualified pension plan upon IRA owner or plan participant's death is not determined under a probate court proceeding (regardless of whether or not there is a will). Nor is the beneficiary determined under the terms of a revocable or family trust that the IRA owner or plan participant may have put in place prior to his or her death. Rather, the beneficiary is typically determined by whom the IRA owner or plan participant listed on the beneficiary designation form provided by the IRA custodian or pension plan administrator. A recent decision by the Federal Ninth Circuit Court of Appeals, *Carmen S. Mays-Williams v. Asa Williams, Jr.*[1] exemplifies and addresses the issues that arise from a disagreement as to whether the beneficiary designation form on file with the qualified pension plan administrator should be controlling as to who is the beneficiary of the qualified pension plan.

<u>SUMMARY:</u> As stated by the Ninth Circuit, the Court had to decide "whether a decedent succeeded in his attempt to ensure that his son – and not his ex-wife – received the

[1] 9th Circuit Court of Appeals, No. 13-35069 (January 28, 2015).

benefits to which his employer's retirement plans entitled him." With respect to the qualified pension plan governed by the Employee Retirement Income Security Act ("ERISA"), the Ninth Circuit reversed the District Court's summary judgment in an ERISA interpleader action seeking a determination as to the proper beneficiary of the proceeds under two employee benefit plans.

The plan participant formally designated his wife as his beneficiary on a beneficiary designation form provided by the plan administrator. After their divorce, he indicated he wanted to designate his son as the beneficiary over the telephone on three separate telephone calls. However, he did not sign and return a beneficiary designation form as requested by the plan administrator who had mailed such forms to him after the phone calls.

The Ninth Circuit held that the beneficiary designation forms were not "plan documents" governing the plan administrator's award of benefits under ERISA.[2] The Ninth Circuit concluded that there was a triable issue as to whether, under state law, the plan participant strictly or substantially complied with the governing plan documents' requirements for changing his beneficiary designation. Ultimately the Ninth Circuit remanded the case for further proceedings.

<u>FACTS:</u> The plan participant in this case was Asa Williams, Sr. ("Asa, Senior"). When Asa, Senior retired in 2004, he had worked for Xerox Corporation for over thirty years. He participated in various benefit programs that Xerox maintained for its employees. The primary plans involved in this case were Xerox Retirement Income Guarantee Plan ("RIGP") and the Xerox Savings Plan ("Savings Plan" and together with the RIGP, collectively, the "Xerox Plans"), both of which were subject to the rules under ERISA.

Asa, Senior married Carmen Mays-Williams ("Carmen") in January 1993. In 2002, he formally designated Carmen as his beneficiary under the Xerox Plans. Following his divorce from Carmen in 2006, he attempted to change his designated beneficiary under the Xerox Plans from his now ex-wife Carmen to his son from an earlier marriage, Asa Williams Jr. ("Asa, Junior"). Specifically, in July 2007 Asa, Senior, "telephonically undesignated" Carmen as his beneficiary under the RIGP and indicated he wanted his son as beneficiary instead. Asa, Senior, gave similar telephonic instructions with respect to RIGP in February 2008 and with respect to both Xerox Plans in January 2011. In each instance, following the telephone conversation with Xerox, Asa, Senior received, but did not sign and return, beneficiary designation forms requesting that he confirm his selection of his son as beneficiary. On May 16, 2011, Asa, Senior died.

A month later, Carmen wrote to Xerox claiming to be her ex-husband's beneficiary under the Xerox Plans. Asa, Junior likewise asserted a right to the plan proceeds. Rather than resolve the competing claims, the fiduciary of the Xerox Plans interpleaded the two parties in federal district court seeking its determination as to the proper beneficiary. Carmen moved for summary judgment, asserting that because Asa, Senior failed to fill out and return to Xerox the beneficiary designation forms, he did not properly designate Asa, Junior as beneficiary in her place.

The federal district court granted Carmen's motion for summary judgment, and declined, on the subsequent motion of Asa, Junior, to reconsider its judgment. Asa, Junior filed a timely notice of appeal.

<u>ANALYSIS</u>: <u>Plan Documents</u>. The Court began its analysis by reviewing in detail various provisions of the Xerox Plans as it tried to determine whether "beneficiary designation forms" were actually part of the Xerox Plans. It started out by analyzing the Xerox Retirement Income Guarantee Plan Agreement ("RIGP Agreement") which provided, the Court viewed, the terms and procedures by which Xerox extends retirement benefits to qualified employees, including the procedure for designating a beneficiary. By its terms,

[2] 29 U.S.C. 1104(a)(1)(D).

unmarried participants "shall designate" a beneficiary, and "may change [the] designation of beneficiary from time to time." In contrast, a married participant had to comply with a more formal process including obtaining "the requisite spousal consent."

The Court then referenced the Xerox Retirement Income Guarantee Plan Summary Plan Description ("RIGP SPD," or "SPD") and noted that while unmarried participants "can name anyone [they] want to be the beneficiary of any death benefit that may become payable," the RIGP SPD then stated that ERISA restricts married participants from freely designating beneficiaries. The Court noted that while the SPD stated specific requirements for a married participant to designate someone other than the spouse, the SPD did not outline any further requirements for designating a beneficiary. Rather, the SPD explained that a participant "may visit the Your Benefits Resources web site . . . or call the Xerox Benefits Center . . . to complete or change [his] beneficiary designation at any time." The Court then noted the SPD explained that, upon the death of an unmarried participant, "a valid beneficiary designation must be on file with the Xerox Benefits Center prior to . . . death," or Xerox will disburse benefits to the participant's estate.

The Court then referred to the Xerox Savings Plan Agreement and noted that a complete copy of this Plan Agreement was not filed with the district court, but also noted that the excerpts of the Plan Agreement that were filed "outline a similar procedure for beneficiary designations to the one described in the RIGP Agreement."

Finally, the Court referred to the Xerox Savings Plan Summary Plan Description ("Savings Plan SPD") and explained that the Savings Plan SPD contained similar language to the RIGP SPD regarding beneficiary designations, but then noted that the Savings Plan SPD "omits any reference to any required 'form,' even when describing the restrictions on a married participant's freedom to designate beneficiaries."

<u>Statutory and Case Law</u>. After reviewing the relevant provisions of the Xerox Plans, the Court focused on the issue before it, i.e. are "beneficiary designation forms" to be treated as part of "plan documents." The Court first noted that an ERISA fiduciary must distribute benefits "in accordance with the documents and instruments governing the plan."[3] The Court then noted that in granting summary judgment in favor of Carmen, the district court determined that the beneficiary designation forms themselves constituted "plan documents" which Asa, Senior needed to sign and return in order to change his beneficiary designation. Asa, Junior disputed this determination and argued that the beneficiary forms do not constitute "plan documents."

The Court first pointed to <u>Kennedy v. Plan Administrator for DuPont Savings & Investment Plan</u>[4] in which the US Supreme Court declined to decide whether the category of "documents and instruments governing the plan" described in ERISA sec. 404(a)(1)(D) included beneficiary designation forms similar to the ones at issue in this case. The Court then stated that it had not yet addressed the question. Thus, the Court concluded, whether such beneficiary forms constitute "plan documents" presented a question of first impression.

The Court then referred to a previous decision by the Court, <u>Hughes Salaried Retirees Action Comm. V. Adm'r of the Hughes Non-Bargaining Ret. Plan</u>,[5] regarding its previous interpretation of a similar ERISA provision, namely ERISA section 104(b)(4). Under this section, plan administrators are required to provide a copy of various plan documents, including SPDs, annual reports, terminal reports, trust agreements, contracts, and "other instruments under which the plan is established or operated" upon the request of a participant or beneficiary. The Court explained that under the above cited case, it interpreted that category to include only "those documents that provide

[3] ERISA section 404(a)(1)(D).

[4] 555 U.S. 285 (2009).

[5] 72 F.3d 686 (9^{th} Cir. 1995).

individual participants with information about the plan and benefits." The Court added that under the above decision, it is explained that ERISA section 104(b)(4) includes only those documents that elucidate "exactly where [the participant] stands with respect to the plan – what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits." Importantly, the Court then pointed out that it specifically rejected an interpretation of ERISA section 104(b)(4) to include "all documents that are critical to the operation of the plan." Rather, the Court noted, that it limited the "other instruments" category to those "similar in nature" to the documents specifically listed in ERISA section 104(b)(4).

The Court then noted that in Kennedy, the US Supreme Court suggested that the "other instruments" category described in ERISA section 104(b)(4) overlaps with the "documents and instruments governing the plan" category in ERISA section 404(a)(1)(d). The Court then pointed out that the category described in ERISA section 404(a)(1)(D) may even be narrower than that described in ERISA section 104(b)(4). The Court explained that, in its opinion, only those documents that provide information as to "where [the participant] stands with respect to the plan," such as an SPD or a trust agreement might, could qualify as governing documents with which a plan administrator must comply in awarding benefits under ERISA section 404(a)(1)(D). The Court then concluded that because the beneficiary designation forms in the present case provided no such information – rather they simply confirmed the participant's attempt to change his designated beneficiary – the forms were not "plan documents" governing the administrator's award of plan benefits.

The Court then returned to its analysis of the actual plan documents. In its view, none of the plan documents incorporated the beneficiary designation forms so as to bring them into the ERISA section 404(a)(1)(D) category of governing documents. The Court pointed out that the RIGP Agreement defined the "Plan" as the provisions "set forth [t]herein or in any amendment [t]hereto." While the RIGP Agreement, in the Court's view, expressly contemplated the incorporation of certain other documents, such as trust agreements, to be "deemed to form a part of the Plan," nowhere did the RIGP Agreement allude to beneficiary designation forms, and none of the schedules annexed to the RIGP Agreement contained even the vaguest reference to a beneficiary designation form. Moreover, the Court stated that while the RIGP SPD referred to the use of forms for married participants to change their beneficiary designations, nowhere did the RIGP SPD refer to the use of any form for unmarried participants.

The Court then expressed its view that nothing in the record indicated that the beneficiary designation forms themselves constituted, or were in any way incorporated into, the governing plan documents. Therefore, the Court concluded, the district court erred in determining that Asa, Senior, was required to abide by the language contained in the forms – but not in the governing plan documents – to change his beneficiary designation from Carmen to Asa, Junior.

Arguments by the Parties: The Court then described the arguments by the parties regarding whether or not the actual beneficiary designation forms should be controlling. Carmen argued that even if the beneficiary forms were not "plan documents," Asa, Senior still needed to comply with them because Xerox exercised its authority to require their use. The Court first referred to Firestone Tire & Rubber Co. v. Bruch[6] which concluded that if a plan grants the administrative discretion to interpret it or to determine benefit eligibility, a court will uphold such interpretation or determination if reasonable. The Court then stated it must determine whether the administrator actually exercised such discretion by sending the beneficiary designation forms to Asa, Senior.

Carmen, the Court noted, argued that the forms themselves were evidence of Xerox's exercise of discretion to require Asa, Senior to

[6] 489 U.S. 101(1989).

complete and to return the beneficiary designation forms in order to effect the change. The Court pointed out the forms indicated "to finalize" and "to validate" the beneficiary designations, the participant must "[s]ign, date, and return" them. However, the forms also stated that they "confirm… your beneficiary designations that you made" and that they referred to the date of Asa, Senior's phone call.

Asa, Junior, however, argued that the record failed to establish that the plan administrators were vested with discretion to require their use. The Court pointed out that the forms listed Hewitt Associates LLC, which was hired as an agent for the plans but was not a plan administrator or other plan fiduciary. Furthermore, the Court pointed out that nothing in the record indicated that the actual plan administrator ever required any other plan participant to sign and to return such beneficiary forms in order to change beneficiary designations.

Moreover, the Court pointed out, rather than award benefits to Carmen due to Asa, Senior's alleged failure to return the signed beneficiary forms, the plan administrator declined to award benefits to either party and instead chose to file an interpleader action. Thus, the Court concluded, the plan administrator impliedly declined to exercise any discretion in determining whether Asa, Senior's telephonic designation of Asa, Junior as beneficiary was valid under the plan. The Court supported this conclusion by referring to <u>Liberty Life Assurance Co. of Boston v. Kennedy</u>[7] where the court held that a plan administrator did not exercise discretion granted to it under the plan when the administrator filed an interpleader action to determine whether a beneficiary designation form filed in accordance with plan documents or a subsequently executed will governed benefit eligibility.

Thus, since Court determined that there had been no exercise of discretion to which the Court could defer, it viewed that it must review de novo whether Carmen or Asa, Junior was entitled to plan benefits, a question the Court determined would be answered by reference to the governing plan documents.

<u>Conclusion by Court</u>: Based on the above analysis, the Court stated that the inquiry was whether Asa, Senior, strictly or substantially complied with the governing plan documents. Such an inquiry, the Court stated, was one of state law[8] and one that implicated Asa, Senior's intentions. The Court quoted from one case: "[I]n cases in which the insurer is not interested, the intent of the insured is entitled to great consideration,"[9] and from a second case: "Summary judgment is notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play dominant roles."[10]

The Court then reached the conclusion that nothing in the governing plan documents prevented unmarried participants from designating beneficiaries by telephone call. It noted that the RIGP Agreement provided that unmarried participants "may change [the] designation of beneficiary from time to time." The Court pointed out, that in clarifying the requirements of the underlying Plan Agreements, both SPDs instructed unmarried participants to call the Xerox Benefits Center or to visit the Xerox website in order to change or to complete a beneficiary designation. The Court further noted that, while the plan documents required written designations for married participants, they did not impose any sort of writing requirement on unmarried participants. Thus the Court concluded that the governing plan documents permitted unmarried participants to change their beneficiary designations by telephone.

<u>Court Decision</u>: Based on the evidence before it, specifically including the Xerox's call log from January 10, 2011 reflecting that Asa, Senior called Xerox to change his beneficiary

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[7] 358 F.3d 1295, 1299 (11th Cir. 2004).

[8] The Court cites *BankAmerica Pension Plan v. McMath*, 206 F.3d 821, 830 (9th Cir. 2000) in support of this view.

[9] *Sun Life Assurance Co. of Canada v. Sutter*, 95 P.2d 1014, 1016 (Wash. 1939).

[10] *Krishna v. Colgate Palmolive Co.*, 7 F. 3d 11, 16 (2d Cir. 1993).

designation from Carmen to Asa, Junior, the Court concluded that a reasonable trier of fact could determine that Asa, Senior intended to change his beneficiary to Asa, Junior. It was further determined that Asa, Senior's phone calls to Xerox constituted substantial compliance with the governing plan document's requirements for changing his beneficiary designation. Accordingly, the Court held that it could not sustain the grant of summary judgment in favor of Carmen. The Court thus reversed the judgment of the district court and remanded the case for further proceedings consistent with its opinion.

Summary: This case presents an interesting analysis of when a beneficiary designation form actually controls who will be the beneficiary of the interests of a pension plan upon the death of the participant. Since the Court determined that the plan documents did not impose any sort of writing requirement on an unmarried participant, the beneficiary designation form on file with Xerox was not controlling. Instead, the Court thought that other evidence of Asa, Senior's intent had to be taken into consideration, including his phone calls to the plan administrator and the logs of those phone calls maintained by the plan administrator. The focus now turns to the District Court and what rulings it will make after a likely set of evidentiary hearings.

Finally, it is important to note that IRAs are not subject to ERISA. Consequently, it is not clear what impact this case will have on beneficiary designation forms filed with an IRA custodian. The primary document for an IRA is the custodial agreement. Thus any court addressing an issue similar to the one in this case would be looking to the terms of the custodial agreement as to the requirements for naming or changing a beneficiary.

FEDERAL TAX NEWS

By DeEtte L. Loeffler, J.D., LL.M. Taxation

2015 saw the return of several tax bills which appear annually and generally die in committee. However, HR 1105, the Death Tax Repeal Act of 2015, has gained more traction than expected. This bill introduced by Representative Kevin Brady of Texas would repeal the federal estate tax but would leave the federal income tax basis adjustment (known as the "basis step-up upon death rule") mostly in place (the first $20 million in appreciated value would be exempt from capital gains tax). The federal estate tax is currently estimated to affect approximately 0.2% of all estates or 5,500 families annually, but is expected to generate an estimated $270 billion in tax revenue over the next ten years. HR 1105 was approved by the House of Representatives on April 16, 2015 and is currently before the Senate for consideration.

The "flat tax" has also made a return this year in the form of the Simplified, Manageable and Responsible Tax (SMART) Act. This bill is represented as a simpler and fairer way to tax income. The bill, introduced in January by Senator Richard Shelby, would impose a 17% flat rate on all income in excess of certain exemptions. The bill exempts the first $14,480 for single persons, $18,490 for heads of households, and $28,960 for married couples filing jointly, and includes $6,240 for dependents. Meanwhile, several Republican presidential hopefuls have come out in favor of some form of flat tax, including Senator Rand Paul and Senator Ted Cruz. Governor Rick Perry, who is expected to also run for president, will probably also bring back his own flat tax proposal. So far, such proposals have no traction with Democrats who see the flat tax as shifting the tax burden from the wealthy to the middle class.

STATE TAX NEWS

By DeEtte L. Loeffler, J.D., LL.M. Taxation

Tax legislation is slowly making its way through California's legislative committees. SB 8 would gradually reduce the income tax rates imposed on individuals and corporations in exchange for imposing a sales tax on most services (such as contractors or attorneys). The state estimates eighty-percent (80%) of California's economy is now service based. Under this plan, state revenues could nearly double to $123 billion. State Board of Equalization Vice Chairman, George Runner, indicated he thinks SB 8 only made sense if the state completely replaces the state income tax with this new service sale tax. The bill would exempt certain kinds of services from the tax, including health care, education and small businesses with gross income of less than $100,000. SB 8 was referred to the Senate Governance and Finance Committee in February.

Another bill making progress is AB 194. This bill would essentially raise revenue for road maintenance by making HOV lanes accessible to more users for a fee. The bill would allow the California Transportation Commission to convert high occupancy vehicle (HOV) lanes to high occupancy toll (HOT) lanes, lifting restrictions on such conversions and removing the requirement of public hearings. Revenue generated by the tolls would be used to maintain, administer, operate and enforce the HOT lanes and any excess revenue would have to be used in the corridor where it was generated. New HOT lanes would allow single and low occupancy vehicles to use the former HOV lanes for a fee, but would remain open to high occupancy vehicles for free or at a reduced cost. One goal is to improve the use of HOV lanes to reduce traffic congestion. This bill is currently before the House Appropriations committee.

Newly introduced SB 16 proposes an increased tax on gasoline, and increased vehicle registration "fees" on electric vehicles, as a way to pay for necessary road maintenance. This bill, introduced by Senator Jim Beal, has not yet been analyzed. The bill is currently before the Governance and Finance Committee.

One bill that is generating a lot of opposition is SB 593, which would require online vacation rental sites, such as Airbnb, to collect the Transient Occupancy Tax (TOT) on its customers. The TOT is imposed by city and county governments under Revenue and Tax Code Section 7280. Airbnb claims it would be required to provide private information about its users that could be used by local government to find those not complying with the law, but state Senator McGuire, the bill's sponsor, denies personal data would be required.

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