

## Domestic Partnership and ERISA

Should a domestic partner in a state-recognized domestic partnership or civil union be treated as a spouse under ERISA? How that question is answered has important consequence in several areas, most significantly statutory spousal survivor benefits and whether a pension can be divided on dissolution of the partnership or union. If domestic partners are not treated as a spouse, they are not entitled to statutory survivor benefits under ERISA. And a division of retirement benefits on the dissolution of a domestic partnership or civil union, although permissible under state law, will likely be ineffective to divide retirement benefits under ERISA.

We are helping a woman, Karen Doty, who was in a long term relationship with her partner, Scott Noble. Ms. Doty and Mr. Noble's relationship was legally recognized by the state of California when they registered as a domestic partnership in 2017. California law explicitly provides that a domestic partner has the same rights, benefits and protections as a spouse.

Mr. Noble had participated in a defined benefit pension plan, which in 2005 was terminated and has since been trustee and administered by the Pension Benefit Guaranty Corporation. The plan provided, as required by ERISA, a qualified pre-retirement survivor annuity, which is an annuity for a spouse of a participant who dies before retirement benefits commence. Mr. Noble died in late 2019, almost two years after he and Ms. Doty formalized their domestic partnership by registering it with California.

Ms. Doty applied for the survivor benefit, correctly noting that she was Mr. Noble's spouse under California law. The PBGC, however, rejected the claim, based on procedures in its internal policy manual, which in turn were modeled primarily on an IRS regulatory position that was directed at the federal *tax status* of a domestic partner. And the Department of Labor has said nothing on the applicability of various ERISA sections to domestic partners since 2013, when in response to the Supreme Court's determination that portions of DOMA were unconstitutional, the Department issued a notice that same-sex marriages would be recognized based on the state of celebration rather than the state of domicile of the married couple. That notice included two sentences noting that

The terms "spouse" and "marriage," however, do not include individuals in a formal relationship recognized by a state that is not denominated a marriage under state law, such as a domestic partnership or a civil union, regardless of whether the individuals who are in these relationships have the same rights and responsibilities as those individuals who are married under state law. The foregoing sentence applies to individuals who are in these relationships with an individual of the opposite sex or same sex.

This part of the notice, however, was simply conclusion with no justification, while the part of the notice on same-sex marriage was based on lengthy and thoughtful analysis.

The Department of the Treasury's regulation defining marriage, referred to above, was adopted in 2016, after the Supreme Court's 2015 decision holding it unconstitutional for states to deny marriage to same-sex couples. The regulation provides that "*for federal tax purposes*, the term "spouse, husband, and wife mean an individual lawfully married to another individual" (emphasis supplied). The regulation further provided that the terms "spouse, husband and wife do not include individuals who have entered into a registered domestic partnership, civil union or other similar formal relationship not denominated as marriage under the law of the state, possession or territory of the United States whose such relationship was entered . . . and the term marriage does not include such formal relationship."

The regulation indicates that its definition of marriage is for "federal tax purposes," not for purposes of ERISA's spousal protective provisions. Indeed, the discussion in the preamble to the regulations discuss filing status and tax treatment of former spouses for alimony. Nothing in the regulation or its preamble (or the proposed regulation and its preamble), nor in the comments on the proposed regulation, mention ERISA, but are focused on *federal tax treatment* of members of same-sex marriages and the *federal tax treatment* of members of domestic partners and civil unions. And the ERISA requirement that a plan provide a survivor annuity for a spouse is a substantive legal requirement and a section 401(a) qualification issue, not an issue that relates to the *federal tax treatment* of a spouse.

There is only one federal case that considered whether a California domestic partner qualified for a statutory pre-retirement survivor annuity under ERISA, *Reed v. Kron/IBEW Local 45 Pension Plan*, 770 Fed. App'x 374 (9<sup>th</sup> Cir. 2019). There a panel of the Ninth Circuit found that the plan trustees abused their discretion in holding that a partner in a California domestic partnership was not a spouse for purposes of the pre-retirement survivor annuity. (The case did note that the plan provided that it would be interpreted in conformance with California law and that it pre-dated the 2016 Treasury regulation, which as we have already noted was directed at federal tax treatment rather than ERISA consumer protections.)

The core of ERISA's current spousal survivor protections was enacted in 1984, as part of the Pension Equity Act. The idea was behind the pre-retirement survivor annuity (and the other spousal protections included in that Act) was that in an economically interdependent union of two people, it was important to provide certain a non-participant in a participant's retirement plan. The law refers to the rights of the spouse and under California law, the parties to a registered domestic partner are literally denominated as spouses. They are entitled, under the laws of California, to their share of community property; they are entitled under the laws of California to spousal support and on divorce, alimony. The definition of spouse should turn on the law of the state that initially recognized the union and in

California a domestic partner has the same rights and responsibilities as a partner in a marriage and is even explicitly denominated as a spouse. A California domestic partner is a spouse to whom ERISA survivorship protections accrue.

The purpose of the ERISA spousal survivorship rules was to protect vulnerable members of an economically joined intimate union between two people; the statute confers the right not on those denominated partners or parties to a marriage, but on spouses, a term that has long been defined by the states. California law denominates members of a marriage and of a domestic partnership as spouses and treats the relationship creating spouses, whether marriage or domestic partnership, as a recognized economically integrated unit, one in which each spouse has support obligations for the other, in which spouse's property is defined by community property laws, and in which each spouse has rights to alimony support after the economic unit is dissolved in divorce. California law should be respected.

Five additional points are also relevant:

First, the definition of marriage and spouse has implications beyond the qualified pre-retirement annuity. The obvious situations are the qualified joint and survivor annuity and the requirement that a spouse is the beneficiary of a profit-sharing plan unless she or he waives that right. But another set of ERISA provisions that would be impacted by the IRS definition of spouse are those related to QDROs. If the definition of spouse does not include domestic partners, a state family court's order to divide a pension—certainly something in which states have a strong interest—would be unenforceable under ERISA anti-alienation and preemption rules. This would be indefensibly bad policy both from the perspective of pension policy and federalism. It would, as a practical matter, add new burdens for plans and probably would mean that many plans have inadvertently engaged in violation of the anti-alienation rules.

Second, the issue of the legal status of spouses in domestic partnerships and civil unions is inextricably tied to the development of domestic partnerships, which was originally a way station for some states, unwilling to permit same-sex marriage, to provide a marriage equivalent for same-sex couples. Indeed, the early statutes typically limited registered domestic partnerships to same-sex unions. The lack of federal recognition of such domestic partnerships and its resulting denial of ERISA protections is historically grounded in the same bigotry toward same-sex relationships as DOMA's lack of federal recognition of same-sex marriage, which the Supreme Court ruled unconstitutional. Rather than look at domestic partners in California through the vantage of ERISA's protective purposes, the Department of Labor and the Department of Treasury made an arbitrary and unreasoned administrative call, resulting in discrimination and unfairness. A person who prefers to label their relationship a domestic partnership rather than a marriage is denied critical protections that attach to a relationship that is in all respects precisely the same as marriage, and in California down to the legal denomination of the partners to that relationship as spouses.

Third, although the Department of Labor and the Department of the Treasury have interpreted certain statutes as applying only to members of a marriage rather than a domestic partnership, the interpretations of those statutes were based on relatively clear legislative history (a history, it should be said, that reflected discrimination against same-sex unions). There is no such legislative history for ERISA nor for the 1984 Pension Equity Act, which predated state creation of domestic partnerships as a marriage equivalent.

Fourth, the Supreme Court, in *Meister v. Moore*, 96 U.S 76 (1877), decided a case that turned on whether a common law marriage was legally cognizable in the state. The Court held it was even though the state statute referred only to ceremonial marriage as a marriage, reasoning that unless the state specifically negated the common law concept of common law marriage, that common law marriage was also marriage even though not denominated as such by the state's statutory law. In California, the state has provided that domestic partnerships constitute an institution that is identical to marriage for state statutory law purposes, just as the Supreme Court held that a common law marriage—not denominated as marriage by statute—was a marriage.

Fifth, the Defense of Marriage Act, which is so far as we are aware the only explicit federal statutory definition of a marriage, provided that “[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.” The only federal statutory definition of marriage is thus of a union of two people. The IRS and PBGC positions that a marriage can only be recognized as such if a state statute expressly “denominate” a union as a “marriage” is inconsistent with ERISA and the federal definition of marriage as written by Congress when it considered the term’s meaning.