

Vesting of Survivor Benefits in Divorce - An Issue of First Impression for the Ninth Circuit: *Carmona v. Carmona*, 544 F.3d 988 (9<sup>th</sup> Cir. 2008)

By Raymond S. Dietrich, Esquire

Raymond S. Dietrich manages a multi-jurisdictional law practice specializing in the drafting and litigation of Qualified Domestic Relations Orders (“QDROs”).

Mr. Dietrich is author of the practice guide entitled *Qualified Domestic Relations Orders: Strategy and Liability for the Family Law Attorney* (2008 © LexisNexis).

The firm’s website is located at [www.qdrotrack.net](http://www.qdrotrack.net)

## **Introduction**

The Ninth Circuit could have disposed of this case easily. Under ERISA §206(d)(3)(F), an assignment of survivor benefits is only permitted to a “former spouse.” In *Carmona*, however, the participant attempted to reassign survivor benefits to his current spouse, not a former spouse. According to the court, ERISA fails to allow reassignment to a future or subsequent spouse. Importantly, the QDRO provisions of ERISA only protect former spouses. Congress’s silence as to the rights of a subsequent spouse is evidence that the right does not exist (*citing Boggs v. Boggs*, 520 U.S. 833, 847 (1997)). Therefore, the use of a QDRO to reassign survivor benefits to a participant’s current spouse is improper.

The Ninth Circuit did not stop their analysis at the interpretation of ERISA § 206(d)(3)(F). Rather, the Court expanded its reasoning to create a workable rule that would apply in most cases requiring a *nunc pro tunc* QDRO. A *nunc pro tunc* QDRO is a judicial remedy that allows a court to correct a matter relating to a timing event. Two (2) timing events that may impact a former spouse’s benefits are death and retirement.

The vesting of survivor benefits in divorce is an issue of first impression for the Ninth Circuit. *Carmona* held that surviving spouse benefits “ordinarily” *irrevocably vest* in the participant’s spouse at the time of the annuity starting date and may not be reassigned to a subsequent spouse. The reasoning of *Carmona* is of key importance, rather than its unique facts. That is, *Carmona*’s reasoning provides a framework for when a *nunc pro tunc* QDRO, in the context of survivor benefits, will be acceptable.

*Carmona*’s vesting rule can be minimized, however, if the attorney recognizes the importance of proper timing and plan notice. Proper timing and plan notice is satisfied when a QDRO is incorporated by reference into the divorce decree and served immediately upon the plan administrator.

Note that a former spouse loses his or her ERISA-based benefits at divorce by operation of law. Thus, it is better practice to notice the plan administrator during the divorce proceeding. A notice of adverse interest served on the plan will provide an additional safeguard against attorney malpractice in the event the QDRO is not incorporated into the decree. Therefore, if proper timing and plan notice practice is followed, *Carmona*’s vesting rule will have little effect on a former spouse’s community interest claim to survivor benefits.

## I. Background

The Ninth Circuit has been forgiving in respect to allowing a post-humous or *nunc pro tunc* QDRO. Three (3) controlling Ninth Circuit cases are: *Tise*, *Stewart*, and *Gendreau*.

In *Tise*, the court permitted the entry a *nunc pro tunc* QDRO issued *after* the participant's death. See *Trs. Of the Dirs. Guild of Am-Producer Pension Benefits Plans v. Tise*, 234 F.3d 415 (9<sup>th</sup> Cir. 2000). Importantly, the plan had notice of the pending QDRO prior to the participants' demise. In a footnote, the court declined to decide if a QDRO could issue after a participant's death if the plan had no notice of a former spouse's adverse interest in the plan.

In *Stewart*, the court permitted the entry of a QDRO issued *after* the participant's retirement. See *Stewart v. Thorpe Holding Co.*, 207 F.3d 1143 (9<sup>th</sup> Cir. 2000). Like *Tise*, the plan had notice of the former spouse's adverse interest in the plan prior to the participant's retirement.

In *Gendreau*, the court held that a QDRO is an enforcement vehicle of an interest assigned to a former spouse in a divorce decree. Notice was not an issue. In *Gendreau*, the objection to the QDRO took place in the context of a bankruptcy proceeding.

*Carmona* reverses the favorable treatment the Ninth Circuit has afforded to former spouses; even though in this case the former spouse's benefits were ultimately protected. Under most fact patterns, however, a former spouse will likely be prohibited from receiving survivor benefits via QDRO if the plan has no notice of a former spouse's adverse interest prior to the participant's retirement and remarriage. In other words, *Carmona's* vesting rule may be used to defeat a former spouse's untimely claim to survivor benefits.

## II. Statement of the Case

**Holding:** The *Carmona* court held that a Qualified Joint Survivor Annuity ("QJSA") (i.e. survivor benefits) "ordinarily" *irrevocably vest* in the participant's spouse at the annuity starting date and may not be assigned to a subsequent spouse. The court concluded that the vesting rule is proper for the following reasons. First, ERISA's statutory scheme for survivor benefits establishes the importance of the annuity starting date. Second, the amendment to ERISA by the Retirement Equity Act establishes the importance of a participant's retirement date and the vesting of the survivor benefits at that time. Finally, the intent of Congress is satisfied by the court's vesting rule.

**Facts and Procedural History:** The plan participant, Lupe Carmona, married his eighth wife, Janis Carmona in 1992. The participant had accrued benefits during the marriage under two (2) ERISA-based plans, to wit: Hilton Pension Plan and a local union pension plan. The participant retired and began drawing on his pension benefits from both plans in 1992. Janis and Lupe divorced in 1997. Lupe married Judy Carmona, his ninth wife, also in 1997.

The participant initiated this action by submitting a QDRO in Nevada State court in 1997 and asked the court to revoke Janis's survivor benefits. The participant died in 1999. The Nevada State court granted the participant's petition and QDRO. The Nevada family court ordered both plan administrators to change the beneficiary designations from

Janis to Judy. The court also imposed a constructive trust on Janis in the event the plans refused or were unable to comply.

Rather than removing the matter to federal court, Janis appealed the decision to the Nevada Supreme Court. In 2003, the Nevada Supreme Court affirmed the family court's ruling. Janis also filed an action in Nevada federal district court. The district court dismissed Janis' claim for lack of jurisdiction under the Rooker-Feldman Doctrine. The district court, however, did not dismiss the union plan's claim contesting the reassignment of survivor benefits. The district court held that ERISA does not preclude a state court from issuing a QDRO which substitutes an alternate payee for a former spouse after a plan participant's retirement. Both Judy and the union plan appealed.

### III. Analysis

*Carmona's* timeline of events is atypical as it relates to the vesting of survivor benefits; the facts are unique. *Carmona* involved the following timeline of events: marriage, retirement, divorce, remarriage, submission of a QDRO. In *Carmona*, the participant sought to reassign survivor benefits to his current spouse. In contrast to *Carmona*, it is a former spouse who typically seeks the assignment of survivor benefits.

Most cases requiring a *nunc pro tunc* QDRO involve the following timeline of events: marriage, divorce, remarriage, retirement and/or death of the participant, submission of a QDRO by former spouse. See *Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153 (4<sup>th</sup> Cir. 1997). In *Hopkins*, the Fourth Circuit held, albeit for different reasons, that survivor benefits vest with the current spouse at retirement. The timeline of events, as compared to *Carmona*, are quite different and worth noting.

#### Timeline Comparison *Carmona* vs. *Hopkins*:

##### *Carmona* Timeline of Events: Atypical

Marriage.....Retirement.....*Divorce*.....Remarriage.....QDRO (current wife)

##### *Hopkins* Timeline of Events: Typical

Marriage.....*Divorce*.....Remarriage.....Retirement.....QDRO (former spouse)

In *Hopkins*, the outcome would have been different had counsel submitted the QDRO in a timely manner at divorce. At a minimum, the attorney should have put the plan on notice of a pending QDRO prior to the participant's retirement. The malpractice issue in *Hopkins* overshadows the vesting rule.

#### A. The Importance of Plan Notice

The Ninth Circuit hedged its vesting rule by addressing the issue of plan notice. Note that *Carmona* held that survivor benefits "ordinarily" *irrevocably vest* in the participant's spouse at the time of the annuity starting date. Importantly, the court used the phrase "ordinarily" in its holding. Thus, the Ninth Circuit recognizes the fact that a

plan may have notice of a domestic relations order prior to retirement but be unable to qualify the order until after retirement. Therefore, it may be inferred that the vesting rule would not apply in cases in which a plan administrator has notice of a pending QDRO prior to the participant's retirement. Plan notice will continue to play a critical role in most cases involving a QDRO and a timing event.

#### B. Distinguishing Between the Annuity Starting Date and Retirement Date

The terms "annuity start date" and "retirement date" are not always synonymous. For example, a participant may retire early but not receive his or her benefits until a later date.

The Ninth Circuit concluded that the vesting rule promotes one of the principal goals of ERISA, to wit: ensuring that plans be uniform and simple in their application (*citing McGowan v. NJR Serv. Corp.*, 423 F.3d 241 (3<sup>rd</sup> Cir. 2005)). Accordingly, administrative convenience should be a consideration when deciding whether ERISA requires plan administrators to act in a certain way, especially considering that plan benefits are based on actuarial calculations. According to the court, a plan administrator must know with certainty the life expectancy of the person receiving the survivor benefits in order to determine the participant's monthly pension benefits.

It is at the annuity start date, typically not the retirement date that the plan administrator is required to calculate the participant's benefits based on the option elected (i.e. single life annuity or QJSA). Therefore it can be inferred from *Carmona*, that a QDRO is likely to be accepted by a plan it is submitted in the interim between retirement and the annuity start date. But why take the chance. If you represent a former spouse, file the QDRO concurrently with the divorce decree.

#### C. Avoidance of the Rooker-Feldman Doctrine

In *Carmona*, the Rooker-Feldman Doctrine applied due to counsel's improper pleading. The Rooker-Feldman doctrine prevents federal district courts to hear appeals from state court *judgments* for lack of jurisdiction. Specifically, the doctrine bars relief from a state court decision in federal court. Conversely, the doctrine does not bar a plaintiff to seek relief in federal district court if the plaintiff alleges an *illegal act* or *omission* by an adverse party.

In *Carmona*, the former spouse did not argue that an adverse party caused her injury. Instead, she plead that her harm was caused by the "state court judgment." Accordingly, the court dismissed her claim for lack of jurisdiction. A different result may have occurred if the action was properly pleaded. The court expressly worded its dismissal and holding by using the words "as pleaded."

Counsel should have also removed the action to federal court upon receipt of the participant's petition for a QDRO in Nevada State court, assuming an exception to removal does not apply; the facts do not indicate if Janis was a Nevada resident at the time of the petition. A defendant may remove a federal question to federal court within thirty days of a plaintiff's state court action. Here, the federal district court had

subject matter jurisdiction as a federal question under ERISA. Unfortunately, counsel failed to remove the action within the requisite thirty day period. Therefore, timely removal would have prevented dismissal and taken the matter away from the Nevada family court.

#### D. ERISA Preempts the Imposition of a State Constructive Trust

In *Carmona*, the Nevada State court also imposed a constructive trust against the former spouse. The Court imposed the trust as an alternative in the event the plan failed or was unable to recognize the participant's current spouse as the survivor benefit beneficiary.

The Ninth Circuit found the state constructive trust to be improper. According to the court, a state court is prohibited from imposing a trust on an ERISA-based pension plan. ERISA preemption supersedes "any and all state laws" as they relate to any ERISA-based plan. See ERISA §514(a); see also *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001). A constructive trust, however, may be a viable alternative involving a state or municipal plan. See *Romans v. Romans*, 2006 Ohio 6554 (App. 2006)(imposing a constructive trust allowing a former spouse to receive survivor benefits despite the prohibition by the Ohio Revised Code).

#### **Conclusion**

The facts of *Carmona* are unique; the timeline of events are atypical. Rather than disposing of the case under a narrow holding, the Ninth Circuit chose to establish a broad vesting rule that will apply in most divorce actions involving the assignment of survivor benefits from an ERISA-based plan. Importantly, the Ninth Circuit held that surviving spouse benefits "ordinarily" *irrevocably vest* in the participant's spouse at the time of the annuity starting date and may not be reassigned to a subsequent spouse.

The vesting rule, however, can be minimized if counsel recognizes the importance of timing and plan notice. Proper timing and plan notice is satisfied when a QDRO is incorporated by reference into the divorce decree and served immediately upon the plan administrator. Therefore, if proper timing and plan notice practice is followed, *Carmona's* vesting rule will have little effect on a former spouse's community interest claim to survivor benefits.