UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

COZEN O'CONNOR, P.C. Plaintiff, v. JENNIFER J. TOBITS and DAVID M. FARLEY and JOAN F. FARLEY, h/w Defendants.	: : : : : : : : : : : : :	Case Number: 2:11-cv-00045 Judge: C. Darnell Jones, II

PLAINTIFF COZEN O'CONNOR, P.C.'S RESPONSE BRIEF IN OPPOSITION TO JENNIFER TOBITS'S SUPPLEMENTAL BRIEF PURSUANT TO THE COURT'S OCTOBER 27, 2011 ORDER AND THE *AMICI CURIAE* BRIEF OF THE HUMAN RIGHTS CAMPAIGN AND THE EQUALITY FORUM

I. Preliminary Statement

Tobits and *amici curiae*, the Human Rights Campaign and the Equality Forum, argue that a private employer is free to establish terms for its employee benefit plan which allow an employee's same-sex spouse to receive benefits under that plan so long as the provisions do not conflict with the federal statutory protections afforded to opposite-sex spouses. Cozen O'Connor agrees that an employer ***may*** do so, but avers that the Cozen O'Connor Plan does not do so. Tobits and *amici* argue that an employer may recognize a same-sex spouse as a designated Beneficiary. Cozen O'Connor agrees that an employer ***may*** do so. But again, the argument fails because Ms. Farley did not designate Tobits as her Beneficiary. In fact, to the extent that the designation of Beneficiary form that Ms. Farley executed is enforceable, it is the Farleys who Ms. Farley designated as her Beneficiaries.

Upon the death of a married participant, the Plan administrator must pay a qualified preretirement survivor annuity ("QPSA") to the participant's surviving spouse in accordance

with ERISA and the Internal Revenue Code, unless the surviving spouse has consented to the Participant's waiver of the QPSA and designation of a different Beneficiary. For the first time, Tobits alleges that she is not seeking the death benefit under the protections that federal law extends to surviving spouses, but rather, she solely seeks to invoke the default provision of the Plan. Tobits and *amici* argue that if there is no opposite-sex spouse, then Cozen O'Connor is free to interpret the term "surviving Spouse" in the default provision to mean a same-sex spouse. It is difficult to understand how this argument aids Tobits. The argument seems to advance the Farleys' claim. Notwithstanding Tobits's new position, as we understand it, that her marriage to Ms. Farley does not qualify her as a surviving Spouse under the ERISA mandated provisions of the Plan, she continues to pursue a claim to the contested funds. This only reinforces the need for interpleader to protect Cozen O'Connor from the conflicting claims.

II. The Court Cannot Avoid the Constitutional Issues Implicated by this Case Because DOMA Prohibits Cozen O'Connor from Extending the Protections ERISA and the Internal Revenue Code Afford to Spouses to a Same-Sex Spouse

Tobits states that, "[t]he benefits at issue in this case are not federally mandated, and DOMA has no relevance to their definition or scope." (Doc. No. 73, p. 44.) Unless she is withdrawing her claim to the benefit, Tobits is wrong. Federal law requires the Plan to provide for payment of a deceased Participant's death benefit to the Participant's surviving Spouse or to a designated Beneficiary if there is no surviving Spouse or if the surviving Spouse consents. ERISA § 205(b)(1)(C)(i); 29 U.S.C.S. § 1055(b)(1)(C)(i); I.R.C. § 401(a)(11)(B)(iii)(I).

> § 1055. Requirement of joint and survivor annuity and preretirement survivor annuity
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> (b) Applicable plans.
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> (1) This section shall apply to--
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> * * *

> (C) any participant under any other individual account plan unless-- (i) such plan provides that the participant's nonforfeitable accrued benefit (reduced by any security interest held by the plan by reason of a loan outstanding to such participant) is payable in full, on the death of the participant, ***to the participant's surviving spouse (or, if there is no surviving spouse or the surviving spouse consents in the manner required under subsection (c)(2), to a designated beneficiary***)
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> * * *

ERISA § 205(b)(1)(C)(i); 29 U.S.C.S. § 1055(b)(1)(C)(i) (emphasis supplied). The Internal Revenue Code promulgates standards for the qualification of an employee benefit plan that mirror the above quoted ERISA provision:

> § 401. Qualified pension, profit-sharing, and stock bonus plans.
>
> (a) Requirements for qualification. A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—
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> * * *
>
> (11) Requirement of joint and survivor annuity and preretirement survivor annuity.
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> (B) Plans to which paragraph applies. This paragraph shall apply to—
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> (iii) any participant under any other defined contribution plan unless— (I) such plan provides that the participant's nonforfeitable accrued benefit (reduced by any security interest held by the plan by reason of a loan outstanding to such participant) is payable in full, on the death of the participant, ***to the participant's surviving spouse (or, if there is no surviving spouse or the surviving spouse consents in the manner required under section 417(a)(2) [IRC Sec. 417(a)(2)], to a designated beneficiary***).

I.R.C. § 401(a)(11)(B)(iii)(I) (emphasis supplied); *see also* I.R.C. § 417 (setting forth special rules related to spousal consent).[1]

Thus, Ms. Farley's death benefit, which is at issue in this case, although payable by a private employer, is absolutely federally mandated under ERISA and under the Internal Revenue Code. The Plan follows this federal law mandate, providing that the accrued benefits under the Plan will be paid to the surviving spouse unless the Participant designates a Beneficiary and the spouse acknowledges the designation and elected Beneficiary in writing. (Plan, §§ 6.2(e), 6.5, 6.6.) The express language of DOMA requires that it applies to these sections of ERISA and the Code. 1 U.S.C.S. § 7. Under these provisions, Tobits is Ms. Farley's spouse only if DOMA is unconstitutional.

III. The Plan Provides for Only One Definition of "Spouse," and Thus, It Cannot Mean a Person of the Opposite Sex with Respect to the Federally-Mandated Provisions and a Person of the Same Sex with Respect to the Default Provision

Tobits argues that her "claim for benefits arises solely under the Plan's default beneficiary language." (Doc. No. 73, p. 46.) *Amici* also seek to invoke the "default beneficiary provision" of section 6.2(f) of the Plan. (Doc. No. 79-2, p. 12.) If Tobits is conceding that she had no right as a spouse to consent to Ms. Farley's designation of the Farleys as her Beneficiaries (or to the waiver of the qualified preretirement survivor annuity), then Cozen O'Connor agrees that the Court need not reach any constitutional issues related to DOMA or PA DOMA, because Tobits consequently is conceding that she is not Ms. Farley's "surviving Spouse."[2]

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[1] To the extent that Tobits or *amici* argue that other ERISA provisions or interpreting case law alter the substance or import of the applicable Code provisions, such argument fails. "Except to the extent specifically provided in the Internal Revenue Code of 1986 or as determined by the Secretary of the Treasury, titles I and IV of the Employee Retirement Income Security Act of 1974 [29 U.S.C.S. §§ 1001 et seq., 1301 et seq.] are not applicable in interpreting such Code." Pub. L. No. 100-203, § 9343(a), 101 Stat. 1330-372 (codified as 26 U.S.C. § 401 note (1987)).

[2] Notably, Tobits's new position is far afield from her original claim to the death benefit. Tobits presented her claim to Cozen O'Connor by letter dated November 30, 2010, attaching a copy of the Marriage Certificate, to advise Cozen O'Connor that she intended "to make a claim with respect to the Death Benefits of [her] wife, Sarah Ellyn Farley." (Doc. No. 3, Ex. C.) Tobits pleaded in her Answer to the Amended Complaint that "she is the surviving spouse of decedent, Sarah Ellyn Farley." (Doc. No. 15, ¶ 3.) Additionally, in Tobits' Crossclaim against

Section 6.2 of the Plan provides, in relevant part, that:

> 6.2 DETERMINATION OF BENEFITS UPON DEATH
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> (e) Unless otherwise elected in the manner prescribed in Section 6.6, the Participant's surviving Spouse shall receive a death benefit equal to the Pre-Retirement Survivor Annuity. The Participant may designate a Beneficiary other than the Spouse to receive that portion of the Participant's death benefit which is not payable as a Pre-Retirement Survivor Annuity. The Participant may also designate a Beneficiary other than the Participant's Spouse to receive the Pre-Retirement Survivor Annuity but only if:
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> > (1) the Participant and the Participant's Spouse have validly waived the Pre-Retirement Survivor Annuity in the manner prescribed in Section 6.6, and the Spouse has waived the right to be the Participant's Beneficiary, or
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> > * * *
> >
> > (3) the Participant has no Spouse, or
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> > * * *
>
> In such event, the designation of a Beneficiary shall be made on a form satisfactory to the Administrator . . .
>
> (f) In the event no valid designation of Beneficiary exists, or if the Beneficiary is not alive at the time of the Participant's death, the death benefit will be paid in the following order of priority to:
>
> > (1) the Participant's surviving Spouse;
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> > * * *

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the Farleys, she pleads that she "did not sign the spousal consent section of the beneficiary designation form for the Plan" (*id.*, ¶ 75), and invokes the protection of sections 6.2 and 6.6 of the Plan providing that "a Pre-Retirement Survivor Annuity shall be paid for the lifetime of the participant's surviving spouse, unless both the participant and the participant's spouse have validly waived the Pre-Retirement Survivor Annuity" (*id.*, ¶ 80). Tobits's claim led Cozen O'Connor to file its complaint in interpleader. She now takes an incongruous position that the meaning of "surviving Spouse" under the default provision, which she argues is not a federally mandated provision under ERISA or the Internal Revenue Code, is different than the meaning of "surviving Spouse" under the provisions that she admits federal law requires. (Doc. No. 73, p. 47) ("the statute uses the term spouse in provisions that . . . require certain pension plans to make available to a spouse certain annuity forms of benefit, including . . . the qualified preretirement survivor annuity (QPSA)") (citing ERISA).

> (3) the Participant's surviving parents, in equal shares;
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> * * *

(Plan, § 6.2(e), (f).)

Here, Ms. Farley executed a designation of Beneficiary form, naming the Farleys as her beneficiaries. (Doc. No. 3, Ex. A.) Tobits now argues that she did not need to sign the designation of beneficiary form as Ms. Farley's spouse, pursuant to ERISA, the Internal Revenue Code, and the Plan's terms as set forth *supra*. It is clear that the term "surviving Spouse" found in section 6.2(f)(1) relates back to the same term used in the federally-mandated section 6.2(e). The context of the Plan's use of the term surviving Spouse in sections 6.2(e) and 6.2(f)(1) makes it obvious that the Plan is referring to the same person. Indeed, there is only one definition found in the Plan for "Spouse." (Plan, § 1.55A) ("'Spouse' means the person to whom the Participant has been married throughout the one-year period ending on . . . the date of the Participant's death.") If Cozen O'Connor meant to provide for a broader interpretation of surviving Spouse to allow a same-sex spouse to recover the death benefit under the default provision, it would have had to use different language to clarify this meaning. Cozen O'Connor agrees with *amici* that, "a plan ***can*** be drafted to provide that a participant's default beneficiary ***could*** be a same-sex spouse or domestic partner." (Doc. No. 88, p. 11.) The Plan at issue, however, was not so drafted.

The federal protections afforded to spouses under ERISA and the Internal Revenue Code, set forth in section II of this brief, require that spouse can only mean a person of the opposite sex. Tobits concedes this point. (Doc. No. 73, p. 48) ("Ms. Tobits does not dispute that [the provisions requiring pension plans to make available to a spouse certain annuity forms of benefit] currently mandate protections only for different-sex spouses"). *Amici* also recognize this principle. (Doc. No. 88, p. 8) ("Because the Cozen Plan makes annuities its 'default' form of payment . . . benefits under the Cozen Plan are subject to the QJSA and QPSA unless waived

by the participant with 'spousal' consent.") (citing Plan, §§ 6.2(e), 6.5(a), 6.6). Tobits fails to explain how Cozen O'Connor can exercise its discretion to interpret "surviving Spouse" under the default provision of section 6.2(f)(1) of the Plan differently from how it must interpret "surviving Spouse" under section 6.2(e) of the Plan. In fact, there is no explanation, because Cozen O'Connor is not free to do so.

The question remains whether Tobits is a spouse under the terms of ***this*** Plan. Because the Plan contains only one definition of spouse, a term that is used throughout the Plan and which, pursuant to federal mandated provisions, may only mean a person of the opposite sex, Tobits is not a spouse so long as DOMA is constitutional. Therefore, the Court should find interpleader appropriate and issue an order granting Cozen O'Connor's motion for judgment on the pleadings, requiring Tobits and the Farleys to interplead and settle among themselves their respective claims and discharging Cozen O'Connor from this action upon payment of the contested funds into the registry of this Court.

IV. If the Court Finds DOMA Is Unconstitutional, the Court Likewise Must Find PA DOMA Is Unconstitutional Because the Plan Requires Cozen O'Connor to Interpret "Spouse" According to Pennsylvania Law

If the Court finds that DOMA is unconstitutional or decides not to reach that issue, the Plan still requires Cozen O'Connor to construe the term "spouse" according to Pennsylvania law. Tobits argues that Pennsylvania courts would not use PA DOMA to strike down Plan benefits. (Doc. No. 73, pp. 38-40.) Tobits' argument is based on a misapprehension of the issue. The issue is not whether Pennsylvania law limits the incidents of marriage arising out of the Plan. Cozen O'Connor agrees that it does not. Rather, the issue is how must Cozen O'Connor define "spouse" under the terms of the Plan. In the absence of controlling federal law, which Cozen O'Connor assumes for the purposes of this argument only, Pennsylvania law squarely applies.

"This Plan shall be construed and enforced according to the Code, the Act and the laws of the Commonwealth of Pennsylvania, other than its laws respecting choice of law, to the extent not pre-empted by the Act."[3] (Plan, § 9.3.) As set forth above, section 1.55A of the Plan defines "spouse," as "the person to whom the Participant has been ***married***" for a one-year period from the date of the Participant's death. (*Id.*, § 1.55A.) "[M]arriage shall be between one man and one woman" and a "marriage between persons of the same sex" shall be void in this Commonwealth. 23 Pa. C.S.A. § 1704. Cozen O'Connor does not aver, nor has it ever raised the argument, that Pennsylvania law prohibits a private employer from paying benefits to a same-sex spouse. Cozen O'Connor merely argues that the Plan requires it to use Pennsylvania law to construe the definition of spouse (if, and only if, federal law does not control its meaning).

Tobits admits that PA DOMA controls "***the definition of marriage***." (Doc. No. 73, p. 40) (emphasis supplied). The Court must determine whether the definition of marriage set forth in PA DOMA is constitutional. Again, Cozen O'Connor's complaint in interpleader is appropriate. For this reason, the Court should remove Cozen O'Connor from this litigation upon payment of the contested funds into the Court's registry.

V. Conclusion

For the foregoing reasons, Cozen O'Connor respectfully requests that this Court issue an order granting Cozen O'Connor's motion for judgment on the pleadings.

[3] In light of this provision specifically denouncing that Pennsylvania choice of law principles apply to the interpretation of the Plan, Tobits' prior argument that Illinois law should apply is meritless.

Respectfully submitted,

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Date: December 21, 2011

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically on December 21, 2011 with the Clerk of the Court for the U.S. District Court for the Eastern District of Pennsylvania using the CM/ECF system. I further certify that all parties in this case are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Jill M. Caughie

Jill M. Caughie