



HENSON EFRON

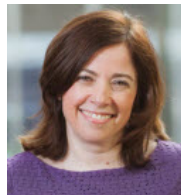
Waiver of Retirement Benefits in Antenuptial & Postnuptial Agreements

by Alan Eidsness and Lisa Spencer

The fundamental purpose of valid antenuptial or postnuptial agreements is to alter the legal rights of married couples that they would otherwise have in the event of divorce or death. Minn. Stat. §519.11. Attorneys who draft such agreements often include broad provisions for the waiver of retirement



Alan C. Eidsness



Lisa T. Spencer

benefits. Counsel should be aware that the 8th Circuit Court of Appeals recently determined that seemingly broad waivers of retirement benefits are ineffective upon enforcement if the terms lack strict conformity with 29 U.S.C. §1055(c)(2)(A) of the Employee Retirement Income Security Act (ERISA).

The case, *MidAmerican Pension and Employee Benefits Plans Administrative Committee v. Cox*, 720 F.3d 715 (8th Cir. 2013), involved the following facts: Between 1997 and 2004, Michael and Kathy Cox were twice married and divorced. They remarried for a third time in March 2010. Prior to their third marriage, they entered into an antenuptial agreement, which in part provided that Kathy waived and released any and all claims to Michael's retirement benefits. They also re-executed it as a post-nuptial agreement. On May 4, 2011, Michael filed a Petition

for Dissolution of Marriage and on May 21, 2011, before the dissolution was finalized, Michael died. While unmarried and prior to the third marriage, Michael designated his parents as beneficiaries of his 401(k) plan. At the time of his death, Kathy had not signed a waiver of rights to the 401(k) and after his death, a dispute arose as to whether Kathy or Michael's parents were entitled to his plan funds. The plan administrator filed an interpleader action seeking determination of the proper recipient of the funds.

Michael and Kathy's antenuptial agreement provided in relevant part:

"Any retirement benefit, account or right, including any distributions or other payments to a party and any increase in such benefit or account during the term of marriage either by contribution, earnings or appreciation ... will be the separate non-marital property of the party who is the participant or owner of the benefit or account except as otherwise specified in this Agreement. ...

"To the extent that either party is entitled to benefits receivable under a retirement plan or individual retirement account, subject to the terms of the Employee Retirement Income Security Act (ERISA) as now existing or hereafter amended, ... the other party hereby irrevocably consents to the participant employee's change in beneficiary or change in the form of payment of benefits without

further consent by the non-participant spouse.

"The non-participant spouse hereby specifically agrees to consent in writing with his/her signature duly witnesses [sic] by a notary public in any election by the Participant to waive any and all forms of survivor benefits, specifically including, but not limited to, any Pre-Retirement Survivor Annuity and Joint Survivor Retirement Annuity Waivers and Beneficiary Designations. The non-participant spouse shall complete any such consents to any waivers of these benefits at any such time as requested by the Participant, whether currently or at any time in the future.

"Wife hereby specifically agrees to properly execute a waiver concerning Husband's retirement plan in the witness of a notary public at any time upon Husband's request following the marriage of the parties."

The 8th Circuit Court of Appeals upheld the district court's determination that Kathy was entitled to the funds because Kathy's consent to sign a waiver to the retirement benefits in the agreement did not conform to the acknowledgment requirement contained in 29 U.S.C. §1055(c)(2)(A) which provides that a participant spouse's election to waive survivorship benefits is only effective if:

(i) the spouse of the participant consents in writing to such election,

(ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and
(iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public[.]

The Court explained that the primary objective of ERISA is to protect plan participants and beneficiaries, particularly surviving spouses (citing *Boggs v. Boggs*, 520 U.S. 833, 845 (1997)), and that §1055 contains strict compliance requirements. Accordingly, the Court of Appeals determined that although the Cox's agreement contained "several broad waiver provisions regarding retirement accounts," the agreement contemplated the future execution of a consent to change beneficiary and therefore did not operate as the actual waiver. In other words, Kathy's promise to execute a future waiver if requested by Michael did not operate as her written consent under subsection (i) and her failure to fulfill that promise meant that she did not meaningfully acknowledge the effect of a waiver pursuant to subsection (iii). In addition, the agreement failed to clearly and expressly inform Kathy that she had a spousal right to receive the 401(k) funds and that she was making an affirmative statement waiving the right. Instead, the agreement was "couched by equivocal language," i.e., it stated that "to the extent that either party is entitled to benefits receivable under the retirement..." and did not unequivocally and expressly provide that Kathy would not receive the funds.

The Court made no analysis of the fact that a marital dissolution matter was pending at the time of Michael's death because, although indicative of intent, that fact was irrelevant: The parties were

married at the time of Michael's death, and as Judge Randall notably said, "you can't 'divorce a dead person.'" *In re Marriage of Rettke*, 696 N.W.2d 846, 850 (Minn.Ct.App. 2005) Instead, strict conformity with §1055(c)(2)(A) was paramount to the Court's analysis. Presumably the Cox's agreement did not include the often-used clause that in the event either party died during the pendency of a dissolution proceeding, the survivor's rights would be governed as if the dissolution had been finalized prior to the party's death. It's doubtful that inclusion of such a clause, however, would have changed the Court's analysis in given the facts of this case.

Although the intent of parties' to antenuptial or postnuptial agreements is not relevant for purposes of applying §1055(c)(2)(A) at a spouse's death, a determination of the parties' intent is key to the analysis when enforcing antenuptial and postnuptial agreements in marital dissolution actions. *McKee-Johnson v. Johnson*, 444 N.W.2d 259, (Minn. 1989). Likely, in light of *Cox*, parties to marital dissolutions will dispute whether the failure to obtain a signed waiver of retirement benefits after marriage signifies an intent to transmute property otherwise defined as non-marital in their agreements to marital property. But unlike *Cox*, in marital dissolution actions, family courts will have the discretion to "cure" parties' failure to obtain an executed waiver based on the courts' interpretation of the parties' intent and may award the retirement benefits to the owner as nonmarital property pursuant to the agreement, regardless of whether or not a waiver was executed.

To ensure conformity with §1055(c)(2)(A) and *Cox*, attorneys assisting parties to antenuptial and postnuptial agreements should draft terms that expressly explain and provide that: 1) upon their marriage and by operation of law, the parties would have spousal rights to the retirement benefits of the other; 2) each party consents to

the other party's election as the participant spouse to waive the qualified joint and survivor annuity form of benefit or the qualified preretirement survivor annuity form of benefit in any and all retirement benefits of the participant spouse; and 3) each party acknowledges that the effect of such election(s) is that the survivor shall have no rights to receive the retirement benefits of the participant spouse upon the participant spouse's death. Attorneys who draft agreement provisions that require parties to sign separate waivers of retirement benefits, as opposed to including the explicit waiver language in the agreement, should consider whether including the requirement of a future act is more of a problem than a cure based on the *Cox* opinion. Attorneys may consider whether or not to separately advise their clients, however, to promptly obtain such waiver forms from the plan administrators for their present (and future) qualified retirement benefits and, after the parties are married, send reminders to the clients to obtain execution of the waiver forms with an explanation of the possible risks for failing to do so.

Alan C. Eidsness, shareholder and head of the family law group can be reached at aeidsness@hensonefron.com. Lisa T. Spencer, a shareholder in family law, can be reached at lspencer@hensonefron.com.