THE ACTUAL LESSONS AND IMPLICATIONS OF *CARMONA* – AND WHY EVERY DIVORCE LAWYER IN THE WESTERN UNITED STATES SHOULD BE HOPING I PREVAIL ON REHEARING

I. INTRODUCTION

"There are three things which I consider excellent
advice. First, don't smoke to excess. Second, don't
drink to excess. Third, don't marry to excess."
– Mark Twain

Lupe Carmona violated these rules. My former client (he has been deceased several years) was married to wife number three when he was employed as a stagehand for a Las Vegas hotel, and accrued various retirement benefits, payable in the future, from the stagehand's union, IATSE.

Later he moved into management with the Hilton Hotel Corporation; he was no longer participating in the IATSE retirement plan, but he did accrue credits with Hilton while he moved through his marriages to wives four, five, six, and seven. None of his spouses through that time ever made any claim of any kind against the retirement benefits he accrued through those marriages.

But by the time he reached mandatory retirement age, he was still married to (but trying to divorce, in protracted litigation) wife seven, Janis. Knowing that he had a terminal illness and wanted to be able to leave a survivor's benefit to his widow, he elected a form of benefit for both his IATSE and Hilton retirement plans that included a survivor's benefit.

For the last several years of his lengthy divorce proceedings against Janis, Lupe was living with and supported by his intended future and final wife, Judy. Janis had accrued some retirement benefits in her own name during her marriage to Lupe, and the divorce decree recited that each party was awarded their own respective retirement benefits, in their entirety, as their respective sole and separate property. The tiny difference in the value of the benefits accrued in his name, versus her name, was calculated, and paid.

Immediately after the divorce, Lupe told both Hilton and IATSE to change the named beneficiary of his survivorship benefits to Judy, but the plans reported that they had no provisions permitting a change of beneficiary except by way of a QDRO. Janis objected to entry of a QDRO changing the named survivor beneficiary.

The family court judge expressly found that Janis had relinquished any and all rights she had to any portion of Lupe's retirement benefits, including the survivor's benefits, in the divorce settlement, and that Janis would be wrongfully enriched if she ever got any of them. He directed that a QDRO should be entered directing the money to Judy, that Janis was not entitled to any of the survivorship money, and that if for whatever reason the money was paid to the wrong person (Janis), she was required to pay it over to the intended beneficiary (Judy) in constructive trust.

Janis appealed before a QDRO could be entered; the Nevada Supreme Court affirmed, and the

QDROs were not actually entered until some years later, on remand.

Once the QDROs were entered, Hilton began paying the money to Judy, as ordered. IATSE (a pension plan in which Janis just ***happened*** to be a participant herself) refused.

II. AS BAD AS A CASE CAN GET

I admire perseverance as much as the next guy, but by any rational measure, this case is absurd. Janis refused to accept the ruling against her, instead re-filing and rearguing the same issue over and over again.

Between 1998 and 2004, Judy prevailed in every forum – the Nevada Family Court (the original divorce case, ruling the benefits belonged to Judy and issuing QDROs); Nevada State District Court, Probate; U.S. District Court (which was dismissed; this is the case in which Janis attempted to sue the sitting State court Judge, counsel, and all parties); United States Bankruptcy Court (where the court ruled that the survivorship benefits Janis was claiming were not hers); Nevada Supreme Court, first denying a writ, and then on two separately-filed appeals (affirming the Family Court's Order in all respects); and the U.S. Supreme Court (Cert. Denied).

Janis filed again in the U.S. District Court, in an attempt to "remove" the years-old Family Court case to Federal Court (basically seeking an appellate review of the State court proceedings), which was firmly dismissed in 2004, and remanded back to the State Family Court with the request that the State court "enforce compliance with its own orders."

Janis filed yet a third Federal District Court action making identical claims, but ***that*** time named both pension plans as defendants as well. It was dismissed, but that third dismissal was the order appealed to the 9th Circuit by both IATSE and Janis. The 9th Circuit panel affirmed the dismissal as to Janis on Rooker-Feldman grounds (which bars suits "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the [federal] district court proceedings commenced and inviting district court review and rejection of those judgments"), but did not find IATSE to be barred from making a case, because it was not a party to the earlier actions.

Looking to the original 1974 phrasing of ERISA, the panel concluded that when Congress mentioned a "surviving spouse," it meant whatever spouse one happened to be married to at the moment of retirement – as opposed to the spouse either when the retirement benefits were earned, or to whom one happened to be married when one died. Nobody found anything in the 1974 legislative history of ERISA to suggest that Congress even thought about the possibility that this could be three separate people.

In other words, the panel decided to construe the terms of ERISA to mean that your "surviving spouse" is not your ***actual*** surviving spouse, but the person who ***would*** have been your surviving spouse if you had remained married to him or her after retiring – even if that person explicitly relinquishes any right to those benefits upon divorce. Having reached that decision, and finding that one cannot do indirectly what can't be done directly, the panel further held the Family Court's

constructive trust to be unenforceable.

III. THE ACTUAL MEANING OF *CARMONA* – AND WHY YOU SHOULD CARE

The panel's reading of ERISA is absurd. The 9th Circuit had already held in the 2000 *Tise* decision that pre-retirement survivor's benefits could be assigned by QDRO, and that the ERISA phrase "payable with respect to a participant under a plan" refers both to payments to a participant, and to a beneficiary, in referencing what payments can be redirected by way of QDRO.

But this panel, dancing (unnecessarily) on the head of a pin, distinguished survivorship benefits payable ***before*** retirement from those payable ***after*** retirement – even though both were created by the same provision of ERISA, and decided that restrictions on the post-retirement ability of a participant to change the ***form*** of benefit (i.e., with or without a survivorship benefit) ***also*** forbid any change to the name of the person who was to receive the money.

The absurdity of the interpretation was pointed out in a hypothetical set out in the briefs – but ignored by the panel:

> the logical preposterousness of IATSE's position should seem apparent. By IATSE's reasoning, if Lupe had been married to Wife "A" for thirty years, accrued 100% of his retirement benefits during that time, divorced her, and married Janis for a ***single day*** on which he happened to retire (immediately afterward divorcing Janis and re-marrying Wife "A," and remaining so married for another 30 years before dying), neither Lupe nor Wife "A" nor any court could do anything to prevent Janis from receiving 100% of the survivorship benefits. It is impossible that the Congressional scheme as set out in ERISA and the REA could be twisted to support such gross inequity.

And the actual facts of this case illustrate the absurdity of the so-called "vesting rule" (a phrase not found in ERISA) just as well as that hypothetical. Lupe started accruing IATSE retirement credits around 1967 – when Janis was seven years old – and ***ceased*** accruing them and moved on to management in Hilton (and a new retirement plan) in 1978 – while Janis was still in high school. Lupe had a completely ***different*** spouse when his IATSE service credits accrued, and did not meet or marry Janis until going through several more wives and after another full decade had passed.

The panel's interpretation of ERISA, however, ignores entirely whether Janis had any natural or community property interest in the funds at issue, in favor of a policy of irrevocable entitlement by coincidence – whether a divorce decree had been entered before or after the date of retirement.

In so doing, it actually adopted IATSE's view – even though Janis has no underlying interest in the retirement benefits Lupe earned long before he met her, and even though Janis was found to have explicitly waived any interest she ***might*** have ever had, and even though there is no QDRO naming former spouse Janis as a surviving spouse in place of the ***actual*** surviving spouse (Judy) – that IATSE should pay Janis the survivorship benefits ***anyway***.

Divorce lawyers should care about this because it makes them responsible for knowing at the time

of divorce whether the deals they make in dividing up assets will or will not be enforced by various retirement plans – and because they will inevitably be sued for malpractice if the deals they make in divorce actions do not result in enforceable orders.

The panel decision explicitly discusses the possibility that parties to divorce cases could outright lie – getting financial concessions in exchange for giving up pension and survivorship rights – and then turn right around, double-cross the divorce court and opposing party, and claim those benefits anyway. The panel apparently did not consider the inequity of such a situation worthy of avoidance, or have any concern with the potential liability of counsel.

If this interpretation stands, divorce courts will not be able to enforce the equities upon divorce as the courts find them to exist, and divorce lawyers will be turned into insurers of the future compliance of pension plans with divorce court orders. It will not be possible to enforce divorce court orders, even by QDRO, and happenstance will be more important than the intent of the parties, or the court.

IV. COLORINGS FROM ABOVE: THE UNITED STATES SUPREME COURT DECISION IN *KENNEDY*

While the most recent rounds of *Carmona* were being litigated, another case worked its way up the federal courts to the United States Supreme Court – *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan, et al.,* 555 U.S. ___, 129 S. Ct. 865 (2009).

In a nutshell, *Kennedy* adopted the "plan documents" rule, under which a retirement plan is free to distribute benefits in accordance with the documents it has on file – even if that means ignoring a waiver of retirement or survivorship benefits as set out in a divorce decree.

But the effects and holdings of *Kennedy* are more subtle. In reaching that conclusion, the Court found that a divorce decree waiver of survivorship interests is ***not*** a prohibited "assignment or alienation" under ERISA, whether under § 1056 or otherwise. That directly contradicted the core holding of the panel decision in *Carmona*, and is part of the Petition for Rehearing En Banc – which has remained pending in the 9th Circuit since October, 2008.

The *Carmona* panel's decision hinged entirely on its belief that upon retirement, survivorship benefits under ERISA "irrevocably vest" in the spouse that happened to be married to the participant at that moment, and could not be thereafter altered.

Kennedy refuted that assertion on its face – the United States Supreme Court had no trouble at all finding that the participant ***could*** have altered the survivorship designation at any time after the divorce (in which the former spouse had relinquished her interest) up to the date he died. It was the fact that he did not actually do so that led to the decision made in the case.

In *Carmona*, Lupe ***tried*** to alter the beneficiary designation from the moment of his divorce from Janice, but IATSE claimed it had no procedure or form for doing so. The *Kennedy* opinion noted

that such circumstances might occur (i.e., a plan might have no process for changing beneficiaries) – but gave no guidance on what to do about it, if that happened.

Kennedy indicates that what was actually done in *Carmona* was exactly what ***should*** have been done to have Judy named as the recipient of the survivorship benefits: Janis had to waive the benefits (as the Family Court found that she did upon divorce), and then a QDRO had to be prepared, and presented to the plan indicating which person in the acceptable class of potential beneficiaries of survivorship benefits (a spouse or former spouse) was to receive them:

> In fact, a beneficiary seeking only to relinquish her right to benefits cannot do this by a QDRO, for a QDRO by definition requires that it be the "creat[tion] or recogni[tion of] the existence of an alternate payee's right to, or assign[ment] to an alternate payee [of] the right to, receive all or a portion of the benefits payable with respect to a participant under a plan." 29 U.S.C. §1056(d)(3)(B)(i)(I). There is no QDRO for a simple waiver; there must be some succeeding designation of an alternate payee.
> . . . .
> Depending on the circumstances, a surviving spouse has a right to a survivor's annuity or to a lump-sum payment on the death of the participant, unless the spouse has waived the right and the participant has eliminated the survivor annuity benefit or designated a different beneficiary. See *Boggs, supra*, at 843; 29 U.S.C. §§1055(a), (b)(1)(C), (c)(2). This waiver by a spouse is plainly not barred by the antialienation provision.

Kennedy also made uncertain the *Carmona* panel's rejection of the Family Court constructive trust. In footnote 10, the Court declined to express "any view as to whether the Estate could have brought an action in state or federal court against Liv to obtain the benefits after they were distributed."

V. THE PENDING DECISION ON REHEARING

The Petition for Rehearing in *Carmona* goes over much of the above, and asks the 9th Circuit to reaffirm its own prior holding in *Tise* that survivorship benefits are "benefits payable with respect to a participant" which may be redirected to any eligible beneficiary by QDRO.

Which is what was attempted in *Carmona*, after the wife-of-happenstance-at-time-of-retirement (Janis) waived those benefits in the divorce decree. Lupe did everything he could, including written directions to the plan and commissioning a QDRO, to name his actual surviving spouse, Judy, as his survivor beneficiary.

The argument now pending asserts that ERISA simply does not provide for "vesting" of a survivor benefit in the potential survivor, and in any event, all retirement and survivorship benefits are assignable to an eligible alternate payee by QDRO, whether termed "vested" or not.

The position taken by IATSE (and accepted by the *Carmona* panel) is contradictory to the purpose of the QDRO exception created by Congress. A contrived and purposeless mis-reading of ERISA should not be permitted to override the clearly-expressed intention of Lupe to name his widow as his survivor beneficiary. Nothing in the law requires any other result, as *Kennedy* illustrates.

VI. MR. DIETRICH'S ARTICLE

Respectfully, Mr. Dietrich's article contains multiple errors of law and fact. For example, his first paragraph states "the QDRO provisions of ERISA only protect former spouses," which as detailed above, is just not true.

29 U.S.C. § 1056(d)(3)(K) defines "alternate payee" as "any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of , the benefits payable under a plan with respect to such participant." And either a spouse or a former spouse may be the recipient of survivor's benefits under a defined benefit plan.

As the 9th Circuit held in *Tise*, survivor benefits are "benefits payable with respect to a participant." They therefore cannot be held to be non-assignable by QDRO without violating § 206(d)(3), which states that ***all*** such benefits are assignable to an alternate payee. That interpretation of the statutory scheme is critical to enabling the division of all marital property (which includes both retirement and survivor benefits). It is also critical to ensuring that "all" benefits payable with respect to a participant are available to satisfy the participant's child and family support obligations, which is the whole purpose of the ERISA/REA statutory scheme.

Mr. Dietrich was entirely correct in stressing the importance of "proper timing and plan notice" and why it is important to get a QDRO on file at the same time as a divorce decree, or at least as close to that date as possible. But no such action would have had any effect on the result – or the dispute now pending – in *Carmona*.

While it is an interesting perspective, Nevada divorce lawyers should be extremely cautious about taking the generalities and prescriptions in Mr. Dietrich's casenote as directory.

VII. UPCOMING CLE ON THE TOPIC

No family lawyer seeking to fully serve his clients can avoid the complexities of dealing with retirement benefits. Those interested in improving their knowledge and skills will have an opportunity in March to jump into the deep end – the first Advanced Track at Ely will explore fine points in both PERS and ERISA QDROs, and explore the meaning of guidance from the courts in *Kennedy*, *Carmona*, and *Hedlund*.