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HIGHLIGHTS

CHILD CUSTODY

- Court Erred in Applying Heightened "Best Interest of Child" Standard in Review of Temporary Custody Order Necessitated by Parent's Military Deployment (see Page 7)
- In this month's Point of View, Sandra L. Mayberry discusses realistic expectations and workable solutions for holiday visitation schedules. (see Page 5)

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- Interest on Equalization Payment Accrued from Date Payment Was Due Under Terms of Stipulated Judgment, and Not from Date of Postjudgment Enforcement Order (see Page 10)

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Domestic Violence Restraining Orders

Family Court Has Jurisdiction to Renew Domestic Violence Restraining Orders Issued by Juvenile Court

*By Carol Rothstein, Esq.**

Two recent Second District cases provide new protections to domestic violence victims by holding, for the first time, that the family court has jurisdiction to renew domestic violence restraining orders (DVROs) that were initially issued by the juvenile court.

The first of these cases, *Garcia v. Escobar* (No. B279530; Ct. App., 2d Dist., Div. 8. 11/15/17) 17 Cal. App. 5th 257, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 1005), holds that the plain language of Family Code section 6345(a) permits the family court to renew restraining orders issued by the juvenile court. Two weeks later, in *Priscila N. v. Leonardo G.* (No. B279584; Ct. App., 2d Dist., Div. 4. 12/01/17) 17 Cal. App. 5th 1208, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 1069, the court agreed with *Garcia* and further concluded that the Family Code and Welfare & Institutions Code should be read broadly to effectuate the Legislature's intent that juvenile and family courts work together to protect victims of domestic violence.

Garcia v. Escobar

Facts and Procedure. Maria and Gilbert dated for seven years and had one child together. After their relationship ended, the juvenile court issued a restraining order after hearing, protecting Maria and the child from Gilbert for three years, and subsequently terminated its jurisdiction.

Before the juvenile court DVRO expired, Maria filed a request for a DVRO in family court, attaching a copy of the juvenile court DVRO to her declaration. At the hearing, the trial court concluded

* Carol Rothstein is the principal author of the California Family Law Monthly. She is a research attorney in Lafayette, California.

Overview. The Court of Appeal affirmed the order, holding that it complied with the placement preferences under the Indian Child Welfare Act (ICWA) [25 U.S.C. § 1901 et seq., Welf. & Inst. Code § 361.31]. The Tribe's letter stating its preferred placement in the specific case did not modify the statutory placement preference. A Tribe may modify the default order of placement preferences set forth in 25 U.S.C. section 1915(b) and Welf. & Inst. Code section 361.31 (b), but it must do so by a resolution (or its equivalent) containing a different, objective order of placement. Because the child's grandmother was a member of the child's extended family and, under the statutory placement preference order, coequal to the cousin, the order placing the child with the grandmother complied with the statutory preference. A good cause finding was not required. The Tribe's preference for placement with the cousin was a factor for the court's consideration in its placement decision.

References: California Family Law Practice and Procedure, 2nd ed., §176.08 (standards for custodial placement under ICWA); Seiser & Kumli on California Juvenile Courts Practice and Procedure, Ch. 2 (dependency) (Matthew Bender 2017). This summary was derived from the California Official Reports Summary [see 2017 Cal. App. LEXIS 1141].

MILITARY SPOUSES

Servicemen's Group Life Insurance Act of 1965

Federal Law Preempted Stipulated Order Requiring Husband to Maintain Wife as Beneficiary of Life Insurance Policy

In re Marriage of Steiner
(No. D071155; Ct. App., 4th Dist. Div. 1. 10/30/17, ord. pub. 11/28/17)
17 Cal. App. 5th 1165, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 1062
By McConnell, P. J. (Benke, Irion, JJ., concurring)

Although a husband violated a stipulated order by changing the beneficiary of his military life insurance policy from his wife to his sister, federal law allowing a service member to change the beneficiary of his life insurance policy at any time preempted the stipulated order, and the trial court properly found that the husband's sister was entitled to the policy proceeds.

Facts and Procedure. In their action for dissolution of marriage, Husband and Wife stipulated to an order requiring Husband, an active military service member, to maintain Wife as the beneficiary of all of his current active duty survivor and/or death benefits, until further order of the court. Notwithstanding this order, Husband changed the beneficiary of a $400,000 life insurance policy issued under the Servicemen's Group Life Insurance Act of 1965 (SGLIA) [38 U.S.C. § 1965 et seq] to his sister, Mary. Five months later, Mary was appointed Husband's guardian ad litem, because he was terminally ill. Mary was unaware of the beneficiary change until a few days before Husband died. After Husband's death, Mary received the policy proceeds.

The court substituted Mary into the case as Husband's successor in interest and ordered the policy proceeds placed into trust accounts. Mary filed a request for an order granting her entitlement to the proceeds. The court granted her request, finding that Mary was entitled to the policy proceeds because the SGLIA allowed the Husband to change his policy beneficiary at any time without notice to or the consent of Wife, and the SGLIA preempted contrary state law.

Supremacy Clause Under the Supremacy clause of the United States Constitution [U.S. Const., art. VI, cl. 2], state law is preempted to the extent it conflicts with federal law. Consequently, a state divorce decree must give way to clearly conflicting federal enactments.

SGLIA and Implementing Regulations. The appeals court explained that the SGLIA gives priority to the beneficiary identified by the service member in writing before his or her death [38 USC § 1970(a)]. The SGLIA's implementing regulations allow a service member to change his or her beneficiary at any time and without the knowledge or consent of the previous beneficiary [38 C.F.R. § 9.4 (b)]. Under the statute, policy proceeds cannot be reached in legal

proceedings, either before or after they are received by the beneficiary [38 U.S.C. § 1970 (g)]. Finally, the regulations prohibit any assignment of the policy proceeds [38 C.F.R. § 9.6].

The SGLIA evinces Congress's intent to give service members unfettered freedom of choice in selecting a beneficiary and to assure that the benefits actually go to the named beneficiary. To this end, when a beneficiary has been duly named, the insurance proceeds cannot be allocated to another person by operation of state law.

***Marriage of Mansell* Inapplicable.** Relying on *In re Marriage of Mansell* (1989) 217 Cal. App. 3d 219, Wife argued that the stipulated order was merely an act in excess of the court's jurisdiction and was therefore not subject to federal conflict preemption. In *Mansell,* the appeals court held that federal conflict preemption did not render a long-final dissolution judgment incorporating a stipulated property agreement void for want of subject matter jurisdiction. *Mansell* was inapplicable here, the appeals court stated, because the instant case does not involve a final judgment dividing community property or a motion to modify such a judgment.

Husband Had Right to Change Beneficiary at Any Time. The appeals court held that under federal law, Husband retained the right to alter his choice of a beneficiary at any time, and the fact that he violated the stipulated order by doing so did not mandate a different outcome. Just as the anti-attachment provision has been held to apply to claims based on property settlement agreements, the court stated, there is no reason why the anti-attachment provision would not similarly apply to the stipulated order.

Wife's Breach of Fiduciary Duty and Fraud Claims Failed. As an alternative argument, Wife contended that Husband and Mary, as Husband's guardian, breached their fiduciary duties to Wife and committed constructive fraud by not notifying Wife of the change in beneficiaries. The appeals court acknowledged that federal preemption would not shield either fraud or a breach of trust tantamount to fraud if the fraud was intended to divest Wife of her separate or community property [*see* Ridgway v. Ridgway, 454 U.S. 46, 58]. However, the court said, the SGLIA benefits were neither Wife's separate property nor community property. Furthermore, Husband had the power to change beneficiaries, and "[b]y exercising that power, he can hardly be said to have committed fraud" [*quoting* Ridgway at 60]. Moreover, said the court, Husband's failure to tell Wife of the beneficiary change was not fraud, since the SGLIA expressly allowed Husband to change beneficiaries without notifying Wife, and Mary was unaware of the beneficiary change until a few days before Husband died.

Commentary

Dawn Gray

Federal preemption over some types of employment benefits is one area with which we struggle because the results seem unfair. We are used to the idea that all benefits acquired by a spouse during marriage from his or her efforts are equally owned by both spouses and must be equally divided upon divorce. That's what we tell our clients and what they expect to happen. Nevertheless, federal preemption carves out mandatory exceptions to this "at least reasonably fair" result under state law and allows the employee spouse to simply keep an employment benefit, sometimes a very valuable one, as his separate property without compensating the other spouse. Congress has decided on public policy grounds that this is appropriate. We just have to live with that, and explain it as best we can to the "unentitled spouse."

We try to work around this by suggesting that the member spouse can privately agree to divide otherwise separate property benefits or at least offer to offset some of that benefit for settlement purposes. That seems to be what the Steiners did. Just as we would advise clients to do with any insurance benefit pendente lite, and as the ATROs require, they stipulated that Husband would maintain Wife as the beneficiary of his SGLIA policy pending the resolution of the case. The only problem is that such an order is unenforceable when it involves federally-preempted benefits. As *Steiner* points out, the employee spouse doesn't even have to honor a state court order involving his benefits when his right to them, or to manage them, is federally preempted.

This may seem unfair to the non-employee spouse, but Congress has decided that some benefits for federal employees are their personal entitlements. We can rant and rave about this, but this is as close to a bright-line rule as it gets in our practices. It

smacks us in the face in a case like *Steiner*. This case is a reminder that the best thing we can do for our non-employee client is be aware of the issue and its full ramifications, fully inform them, manage their expectations given the state of the law, and move forward.

Commentary

Stacy D. Phillips and Kevin B. Martin

The fact pattern in *Steiner,* while certainly interesting, is unlikely to come across most practitioner's desks. In *Steiner,* Husband and Wife stipulated to an order requiring Husband, then an active service member, to maintain Wife as the beneficiary of all of Husband's active duty survivor and/or death benefits. Thereafter, ignoring the court's order, Husband changed the beneficiary of his life insurance policy from Wife to Husband's sister. Instinctively, Husband's disregard of the Court's order appears to be sanctionable, permitting Wife to recover, at the very least, the $400,000 that Husband's sister received upon Husband's death. Unfortunately for Wife, the Court of Appeal concluded that Wife had no recourse in the wake of Husband's wanton violation of the court's order.

The Court of Appeal's decision in *Steiner* is predicated upon the Supremacy Clause of the United States Constitution. In particular, according to the Servicemen's Group Life Insurance Act of 1965, servicemen are permitted to change the beneficiary of their life insurance policy *at any time and without any limitation*. Indeed, the opinion even states that the policy "is not a shared asset subject to the interests of another, as is community property." Thus, while Husband was precluded from changing the beneficiary of his life insurance policy pursuant to the court's order, he was permitted to do so under federal law. Accordingly, under the Supremacy Clause, the court's order was preempted by the Servicemen's Group Life Insurance Act of 1965, leaving Wife with no remedy and no life insurance benefits.

This is not the first time we have seen an asset that is seemingly community turn out to be the equivalent of separate property, not subject to division. As attorneys, we need to be aware of these "special" assets and craft resolutions with that information considered.

The Court of Appeal's decision in *Steiner* was the right one. Unfortunately for Wife, the deal she cut was subject to an unforeseen and esoteric legal loophole.

Commentary

Marshall S. Zolla

You thought concentrating your practice in family law would mean little or no contact with federal law or federal courts? Not so fast. The Employee Retirement Income Security Act of 1974 (ERISA) [29 U.S.C. § 1001 et seq.] is a major federal law governing retirement plan benefits that can preempt state marital dissolution laws that may conflict with its provisions.

In *Kennedy v. Plan Administrator for Dupont Savings and Investment Plan* (2009) 555 U.S. 285, 129 S.Ct. 865, 172 L.Ed.2d 662 [2009 Cal. Fam. Law Monthly No. 3 at 65], the parties' divorce decree divested wife from all of husband's retirement plan benefits. But he never changed the beneficiary designation after their divorce. He died, and his daughter, as Executor, asked Dupont to distribute the pension funds to his estate. Relying on the beneficiary designation which still named his ex-wife, the Plan Administrator paid the balance of nearly $400,000 to the former wife. The U.S. Supreme Court held that Wife's waiver in the divorce decree did not require the Plan Administrator to honor that waiver. The Supreme Court held that the Plan Administrator correctly performed its statutory duty under ERISA by paying the benefits to the ex-wife pursuant to the plan documents. The case emphasizes the need for family law attorneys to advise clients, in writing, to change beneficiary designations after entry of judgment, even when the beneficiary has agreed to waive such benefits. A waiver of rights to plan benefits did not trump an existing beneficiary designation made in accordance with the provisions of the plan.

In the *Steiner* case, the federal law at issue was the Serviceman's Group Life Insurance Act of 1965 (SGLIA) [38 U.S.C. § 1965 et seq.]. Here, the Judgment required husband to maintain wife as beneficiary of all his current active duty survivor and/or death benefits pending further order of court. Husband thereafter changed the beneficiary to his sister. After his death, the sister received the policy