

ANSWER

As to paragraphs 1-10 and 13-20, the Farleys admit the allegations therein.

As to paragraph 11, the Farleys admit the allegations therein and further state that the beneficiary form does not merely purport to show but does actually show that Ellyn represented her marital status as “single” and designated her parents, the Farleys, as her plan beneficiaries.

As to paragraph 12, the Farleys admit that the designation of beneficiary form bears the date of September 12, has Ellyn’s true signature on the line that states “Participant’s Signature,” bears a notarization of her signature, bears her designation that she was “single,” is not signed by a “spouse” as Ellyn had no spouse as that term is defined in the plan and under relevant law, and deny all other allegations in this paragraph.

As to paragraph 21, the Farleys lack knowledge and information sufficient to form a belief as to whether plaintiff is actually uncertain as to whom it should distribute the plan benefits, and thus they deny that allegation.

Wherefore, the Farleys respectfully request that the Court:

- A) Deny plaintiff’s request for attorneys’ fees and costs either because none were incurred or because plaintiff was not required to repair to this Court for relief from the clear dictates of its own retirement plan and relevant law; and,
- B) Grant all other relief to which the Farleys are justly entitled on the premises.

COUNTERCLAIM AND CROSSCLAIM PURSUANT TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (“ERISA”), 29 U.S.C. § 1001, ET SEQ.

Defendants/counterclaim & crossclaim plaintiffs, Joan and David Farley, by their undersigned counsel, complain of plaintiff/counterclaim defendant Cozen O’Connor and defendant/crossclaim defendant Jennifer Tobits as follows:

1. Joan and David Farley are the surviving mother and father of decedent Sarah Ellyn Farley, a female.

2. Cozen O'Connor is a Delaware corporation with its principal offices in the Commonwealth of Pennsylvania. Ellyn Farley, a litigator in the Chicago office of Cozen O'Connor, was enrolled in the firm's ERISA profit sharing plan whereby Cozen O'Connor promised to distribute the value of Ellyn's plan to her beneficiaries upon her death. The Farleys believe and are informed that Cozen O'Connor has retained the plan benefits to the present day, to the continued financial benefit of Cozen O'Connor and the continued financial detriment of the Farleys.

3. Jennifer Tobits is a female Illinois resident who has laid claim to Ellyn's plan benefits on the theory that she was the surviving "spouse" of Ellyn at the time of her death.

4. This Court has jurisdiction over the suit pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(a)(1)(B) and (3)(B)(i) & (ii).

5. Venue is proper in this district pursuant to 29 U.S.C. § 1132(e)(2) because the ERISA plan is administered in this district.

6. On September 9, 2010, with awareness of her fatal illness, Ellyn began executing documents to divide her property between her parents, Joan and David Farley, and Jennifer Tobits. She first drafted a holographic will, a true and accurate copy of which is attached hereto as Exhibit A.

7. On September 12, 2010, Ellyn executed a beneficiary designation form for the Cozen O'Connor profit sharing plan, designating Joan and David Farley to be her beneficiaries, a true and accurate copy of which is attached hereto as Exhibit B.

8. On September 12, 2010, Ellyn also executed a deed conveying her sole interest in her condominium into a joint tenancy with rights of survivorship for both herself and defendant Tobits, a true and accurate copy of which is attached hereto as Exhibit C.

9. On September 12, 2010, Ellyn divided the assets of her bank account, writing a check of \$35,000 to Joan Farley and another check of \$39,732.50 to defendant Tobits, true and accurate copies of which are attached hereto as Exhibit D. The Farleys believe that defendant Tobits cashed her check that same day. However, the Farleys stayed at Ellyn's bedside until she died the next day, September 13, and when the Farleys later presented the check to Chase Bank, the check was refused due to Ellyn's passing. The Farleys believe and are informed that Tobits eventually secured payment to herself of all remaining funds in Ellyn's bank account, including those funds intended for the Farleys.

10. The Cozen O'Connor profit sharing plan, whose terms are attached in pertinent part as Exhibit E to the first amended complaint and described therein, provides that plan benefits are distributed upon death in one of the following ways:

- a. if a plan participant has not designated a beneficiary, the plan benefits are paid in order of priority to "(1) the Participant's surviving Spouse; *** (3) the Participant's surviving parents, in equal shares;"
- b. if the plan participant has designated beneficiaries but without consent of the participant's spouse, the spouse receives a "Pre-Retirement Survivor Annuity," with the designated beneficiaries receiving the remainder of the plan benefits; and

- c. if the plan participant has designated beneficiaries and either the spouse has waived the right to be the beneficiary or there is no spouse, the beneficiaries receive the entirety of the plan benefits.

11. The term “Spouse” is defined in article I, section 1.55A of the plan as “the person to whom the Participant has been married throughout the one-year period ending on ... the date of the Participant’s death.”

12. The plan, at article IX, section 9.3, commands that it “shall be construed and enforced according to the [Internal Revenue Code], the [Employee Retirement Income Security Act (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”

13. Under the law of the Commonwealth of Pennsylvania, marriage is limited to one man and one woman, and the Pennsylvania Defense of Marriage Act provides that: “It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.” 23 Pa. C.S.A. § 1704.

14. Moreover, federal law limits marriage to one man and one woman, and the federal Defense of Marriage Act provides that: “In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” 1 U.S.C. § 7.

15. Because Ellyn Farley and defendant Tobits were not “married” under relevant law for the year prior to Ellyn’s death, Tobits cannot be considered a “spouse” under the plan.

16. Ellyn’s beneficiary designation, moreover, makes clear her wish that Joan and David Farley be the beneficiaries of her profit sharing plan.

17. There can be no dispute under the plan’s terms as to the identity of the rightful beneficiaries, and the plan benefits should have been disbursed by Cozen O’Connor to Joan and David Farley immediately after Ellyn’s passing.

18. The Farleys have all legal and equitable rights to the plan benefits.

19. Neither defendant Tobits nor any others have legal or equitable rights to the plan benefits, nor even a colorable claim to those benefits.

20. The Farleys are entitled to their costs and fees in bringing this action, along with prejudgment interest on the plan benefits.

WHEREFORE, Joan and David Farley respectfully request that the Court:

- A) Award the entirety of the plan benefits of Ellyn Farley to Joan and David Farley;
- B) Award prejudgment interest on the plan benefits to the Farleys;
- C) Award attorneys’ fees and costs to the Farleys; and
- D) Grant the Farleys all other relief to which they are justly entitled on the premises.

Respectfully submitted,

/s/Randall L. Wenger

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CERTIFICATE OF SERVICE

I, Randall L. Wenger, an attorney herein, certify that I caused this answer, counterclaim, and crossclaim to be served on all counsel via the Court's CM/ECF system on August 1, 2011.

/s/Randall L. Wenger

* Application for leave to appear *pro hac vice* to be filed.