No.

In the Supreme Court of the United States

KIMBERLY COWSER-GRIFFIN, EXECUTRIX OF THE ESTATE OF DAVID GRIFFIN, PETITIONER

v.

SANDRA D.T. GRIFFIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether ERISA permits a state court to retroactively reassign plan benefits after the plan participant's death when the participant directed that the benefits would go to his spouse and when the plan documents directed that the benefits would go to the spouse absent the spouse's consent to reassignment.

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The opinion of the Supreme Court of Virginia (App., *infra*, 1a-13a) is unreported but is available at 2015 WL 798707. The opinion of the Court of Appeals (App., *infra*, 14a-62a) is reported at 753 S.E.2d 574. The memorandum opinion of the Circuit Court of Sussex County (App., *infra*, 63a-73a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on February 26, 2015. On May 15, 2015, the Chief Justice extended the time for filing a petition for a writ of certiorari to June 26, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The preemption provision of the Employee Retirement Income Security Act of 1974 ("ERISA") states, in pertinent part, that "the provisions of this subchapter * * * shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit described in section 1003(a) of this title and not exempt under section 1003(b) of this title." 29 U.S.C. § 1144(a).

ERISA's plan-documents provision directs that "a fiduciary shall discharge his duties with respect to a plan * * * in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D).

Finally, ERISA's anti-alienation provision declares that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1).

INTRODUCTION

ERISA "protect[s] contractually defined benefits." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 148 (1985), by creating "a scheme that is built around reliance on the face of written plan documents." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 83 (1995). This focus on plan documents protects employees by ensuring that they "may, *on examining the plan documents*, determine exactly what [their] rights and obligations are." *Ibid.* (quoting H.R. Rep. No. 1280, 93rd Cong., 2d Sess. 297 (1974)). It likewise provides guidance to plan administrators by "ensur[ing] that plans and plan sponsors [are] subject to a uniform body of benefits law." *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) (quotation marks and citation omitted).

In 2012, David Griffin, an employee of Dominion Virginia Power ("Dominion"), died. The explicit terms of his ERISA-governed retirement plan named petitioner—Mr. Griffin's surviving spouse—as his sole beneficiary. In a series of sharply divided opinions, however, the Virginia courts held that state law authorized the issuance of a post-death order that retroactively divested Mr. Griffin's designated beneficiary of the benefits the plan explicitly conferred on her upon his death. This result contravenes the language and purpose of ERISA. Moreover, the decision deepens a conflict among the federal courts of appeals and state courts of last resort about whether state courts may retroactively reassign ERISA benefits even after they have vested in the plan's designated beneficiary.

Resolution of the question presented is crucial in determining who is entitled to benefits under ERISA-governed employee benefit plans. Nearly half of all American workers participate in such employee benefit plans; in 2010 alone, such plans distributed $479 *billion* in benefits to beneficiaries. Ensuring that these matters are governed by a uniform body of federal law—rather than an unpredictable patchwork of conflicting state laws—is vital if the Nation's employee benefit system is to function as Congress intended. The current split places administrators of multi-state pension plans in the untenable position of having to choose between the plain terms of the plans they administrator and conflicting court decisions that require them to recognize post-vesting (and frequently posthumous) QDROs. Because divorce and remarriage is a common occurrence, the specific issue presented by the petition recurs commonly; indeed, another (divided) court has weighed in on the issue just since this case was decided. This Court's intervention is needed to restore national uniformity in the application of critical employee benefit programs.

STATEMENT

1. Congress enacted ERISA to protect the interests of participants and their beneficiaries in "employee benefit plan[s]." 29 U.S.C. § 1002(3). To do so, Congress created "a uniform regulatory regime," *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208 (2004), which provides "a set of standard procedures to guide processing of claims and disbursement of benefits."

Egelhoff v. *Egelhoff*, 532 U.S. 141, 148 (2001) (quotation marks and citation omitted).

To ensure that ERISA functions as a "comprehensive statute designed to promote the interests of employees and their beneficiaries," *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983), Congress included an unusual, "clearly expansive" express preemption provision. *Egelhoff*, 532 U.S. at 146 (internal quotation marks omitted). That provision declares that ERISA "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA. 29 U.S.C. § 1144(a).

ERISA provides that covered plans are to be administered "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). Plan documents must "specify the basis on which payments are made to and from the plan," *id.* § 1102(b)(4), and the plan administrator must determine payments "in accordance with [plan] documents," *id.* § 1104(a)(1)(D).

ERISA also provides specific rules governing the disbursement of benefits. In particular, it directs that "benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). There are only two narrow exceptions to this anti-alienation rule. First, benefits may be alienated or reassigned with the written consent of the participant's spouse. *Id.* § 1055(c)(2)(A).

Second, benefits may be reassigned pursuant to what ERISA calls a "*qualified* domestic relations order" (QDRO). 29 U.S.C. § 1056(d)(3)(A) (emphasis added). For purposes of ERISA, a "domestic relations order" is "any judgment, decree, or order" entered under state law that "relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant." *Id.* § 1056(d)(3)(B)(ii).

Not all domestic relations orders are QDROs, however. Congress directed that a domestic relations order is "qualified" *only* if it "creates or recognizes the existence of an alternate payee's right to * * * receive all or a portion of the benefits payable with respect to a participant under [an ERISA] plan," 29 U.S.C. § 1056(d)(3)(B)(i)(I), *and* satisfies several additional requirements, including specifically identifying "each [ERISA] plan to which such order applies." *Id.* § 1056(d)(3)(C)(iv); *id.* § 1056(d)(3)(B)(i).[1] A party who asserts a right to payment under a purported QDRO must present the order in question to the plan administrator, who must "within a reasonable period" of time, "determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination." *Id.* at § 1056(d)(3)(G)(i)(II).

[1] To constitute a QDRO, a domestic relations order also must specify the names and mailing addresses of the alternate payee and affected plan participant, the amount or percentage of the benefits to be paid or the means by which that amount will be determined, and the number of payments or time period to which the order applies. 29 U.S.C. § 1056(d)(3)(C). The order also must comply with the restrictions set forth in 29 U.S.C § 1056(d)(3)(D), which directs that a QDRO may not require a plan administrator to provide increased benefits, provide a type of benefits not permitted under the plan, or violate a previously entered QDRO.

2. Petitioner Kimberly Cowser-Griffin is the widow of David Griffin. During their marriage, Mr. Griffin was employed by Dominion and participated in Dominion's Salaried Savings Plan ("Dominion Plan" or "Plan"), which provides retirement and death benefits payable pursuant to ERISA and certain Plan documents. App., *infra*, 64a. In accordance with ERISA's anti-alienation provision, see p.4, *supra* (quoting 29 U.S.C. § 1055(c)(2)(A)), the Plan provides that, upon the death of the participant, benefits will be distributed to his or her surviving spouse unless either (a) the spouse explicitly consents in writing to the benefits' going to another beneficiary or (b) the benefits are directed to an alternate beneficiary pursuant to a QDRO. App., *infra,* 16a.[2] When Mr. Griffin died, the Plan documents he had completed designated petitioner as the beneficiary, *id*. at 16a-17a, petitioner had not consented to the naming of a different beneficiary, and "[n]o party had applied for a QDRO or notified the Dominion Plan Administrator of an alternate payee," *id.* at 17a.

Mr. Griffin previously was married to respondent, with whom he had two children. Upon their divorce in 1996, Mr. Griffin and respondent entered into a Property Settlement Agreement ("PSA") App., *infra*, 15a. That agreement, which was incorporated into

[2] The Plan documents state: "if you are married when you die, your spouse must receive the distribution unless she or he approves of your choice of another (or an additional) beneficiary before your death," App., *infra,* 80a, adding that "if you are divorced, benefit payments from the * * * Plan may be made to your former spouse, your child, or other dependent only in response to a Qualified Domestic Relations Order," *id.* at 81a.

the final decree of divorce, provided that so long as either of their children was under the age of 21, the children would be designated as co-beneficiaries "under all 401(k) Plans and other such plans which would be distributed upon the death of either party." *Ibid.* It is undisputed that neither the PSA nor the final divorce decree met ERISA's statutory requirements for a QDRO. *Id.* at 3a, 64a.

Following the divorce, Mr. Griffin named his children as his designated beneficiaries under the Dominion Plan. App., *infra*, 16a. More than ten years after the signing the PSA, Mr. Griffin married petitioner, and, the next year, he changed the designation, making petitioner his sole beneficiary. App., *infra*, 16a-17a. Mr. Griffin also was diagnosed with renal cancer. After a prolonged battle with the disease, he died on May 26, 2012. *Id.* at 17a.

When he died, Mr. Griffin was employed by Dominion and married to petitioner. App., *infra*, 17a. The Griffin children were then 24 and 19 years of age. *Id.* at 63a-64a. In the 14 years between the final divorce decree and Mr. Griffin's death, respondent never attempted to obtain a QDRO nor took any action to notify the Plan Administrator of a potential alternate payee for Plan benefits. *Id.* at 17a.

3. a. Several months after Mr. Griffin's death, respondent asked a Virginia state court to re-open the 14-year-old divorce proceeding and enter an order that would have the effect of retroactively changing Mr. Griffin's beneficiary designation under the Dominion Plan. App., *infra*, 64a. The trial court denied respondent's request, explaining that because respondent failed to obtain a QDRO before

Mr. Griffin's death and failed to put the Plan on notice of the children's interest in the benefits, the Plan benefits "vested entirely in the designated beneficiary and surviving spouse, Ms. Kimberly Cowser-Griffin." *Id.* at 72a.

b. A sharply divided panel of the Court of Appeals of Virginia reversed. The two-judge majority held that the Plan benefits had not vested in petitioner when Mr. Griffin died because the Plan documents permitted assignment of benefits through QDROs and it was of no moment that no QDRO was "entered" or even sought "until after Mr. Griffin's death." App., *infra*, 37a. The court further concluded that the divorce decree had vested beneficiary rights in the Griffin children because Plan benefits were alienable under state law. *Id.* at 45a-46a. In dissent, Judge Huff emphasized that the Dominion Plan is "governed by ERISA, which pre-empts state law," *id.* at 46a, and reasoned that "the federal protection afforded to the surviving spouse should prevail because neither a QDRO nor spousal consent have been established," *id.* at 62a.

c. The Supreme Court of Virginia affirmed by a one-vote margin. The operative portion of the majority's unsigned order reads, in its entirety:

> Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that the Court of Appeals of Virginia did not err.
>
> For the reasons stated in the majority opinion of the Court of Appeals in *Griffin v. Griffin*, 62 Va. App. 736, 753 S.E.2d 574 (2014), the judgment of the Court of Appeals is affirmed.

App., *infra*, 1a.

Justice Millette filed a lengthy dissent, joined by Chief Justice Lemons and Senior Justice Koontz. App., *infra*, 2a. The dissent noted that the PSA and final divorce decree provided the Griffin children "with rights under state law, but not rights that were enforceable under ERISA." *Id.* at 4a. The dissenting Justices reasoned that "[t]he Plan documents, in combination with relevant statutes, afford the basis for this Court to conclude that the benefits at issue became vested in Mrs. Cowser-Griffin at the time of Mr. Griffin's death." *Id.* at 7a. Such a result, Justice Millette explained, would be "consistent with the majority of ERISA case law, which treats the retirement or death of a participant as a vesting event for the surviving spouse beneficiary," *ibid.*, and with ERISA's "policy preference toward protecting the interests of the surviving spouse," *id.* at 13a.

REASONS FOR GRANTING THE PETITION

This Court has repeatedly said that ERISA establishes "a straightforward rule of hewing to the directives of the plan documents that lets employers 'establish a uniform administrative scheme, [with] a set of standard procedures to guide processing of claims and disbursement of benefits.'" *Kennedy* v. *Adm'r, Dupont Sav. & Inv. Plan*, 555 U.S. 285, 300 (2009) (quoting *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 148 (2001)) (alterations in original). Because conflicting state law threatens this uniformity, moreover, this Court has "not hesitated to enforce ERISA's preemption provision where state law created the prospect that an employer's administrative scheme would be subject to conflicting requirements." *Fort*

Halifax Packing Co. v. *Coyne*, 482 U.S. 1, 10 (1987). In a series of sharply divided decisions that split the state court judges who heard this case 6 to 5, the Virginia courts declined to follow the plain language of the Dominion Plan documents and held that state law authorized a retroactive change in beneficiary designation after Mr. Griffin's death. The decision below deepens an existing split, conflicts with the explicit terms of the statute and the governing Plan, and raises important and recurring issues involving the proper administration of ERISA. As an eminent federal judge recently observed, the proposition that a state judge may retroactively reassign ERISA benefits after a plan participant's death is "a conclusion of seismic consequences," that "thwarts the intricate federal statutory scheme surrounding the antialienation of pension benefits." *Yale-New Haven Hosp.* v. *Nicholls*, No. 13-4725-cv, 2015 WL 3498771, at *10 (2d Cir. June 4, 2015) (Wesley, J., concurring in part and dissenting in part). This split requires administrators of multi-state pension plans to choose between the plain terms of the plans they administrator and conflicting court decisions that require them to recognize retroactive, post-vesting QDROs. This Court's intervention is urgently needed.

A. This Case Deepens An Acknowledged Conflict About Whether State Courts Can Retroactively Reassign ERISA Benefits After They Vest In The Designated Beneficiary

This case presents a straightforward and recurring question: Where (as here) "[a] plan participant is married to another" at the time of the "benefit-triggering event," must "a former spouse with an interest in the participant spouse's pension * * * obtain * * * a QDRO *before* the plan participant's retirement or preretirement death"? *In re Marriage of Padgett*, 91 Cal. Rptr. 3d 475, 483 (Cal. Ct. App. 2009) (emphasis added).

As courts and commentators have recognized, there are "two lines of authority on th[at] question." *Padgett*, 91 Cal. Rptr. 3d at 483; accord *R.A.F.* v. *S. Co. Pension Plan*, No. 2:07-cv-192-WKW, 2008 WL 2397391, at *9 (M.D. Ala. June 10, 2008) (observing that "there is a circuit split on th[e] issue" of "whether ERISA requires a party to qualify a QDRO prior to the death of a participant"); Aaron Klein, Note, *Divorce, Death, and Posthumous QDROs: When Is It Too Late for A Divorcee to Claim Pension Benefits Under ERISA?*, 26 Cardozo L. Rev. 1651, 1651 (2005) ("The United States Courts of Appeals * * * are divided as to whether a former spouse's application for a deceased plan participant's pension benefits pursuant to a divorce decree is valid retroactive to the death of the plan participant." (footnotes omitted)). The decision below sharpens and extends this conflict.

1. In conflict with the decision below, "numerous courts have concluded or implied that surviving spouse benefits vest in the participant's spouse at the time of the participant's retirement or preretirement death." *Nicholls*, 2015 WL 3498771, at *11 (Wesley, J., concurring in part and dissenting in part). The Third, Fourth, and Fifth Circuits, as well as the Minnesota Supreme Court, have held that state courts lack the authority to issue QDROs once benefits vest upon a participant's death or retirement. See

Samaroo v. *Samaroo*, 193 F.3d 185, 191 (3d Cir. 1999); *Hopkins* v. *AT & T Global Info. Solutions Co.*, 105 F.3d 153, 157 (4th Cir. 1997); *Rivers* v. *Cent. & Sw. Corp.*, 186 F.3d 681, 683-684 (5th Cir. 1999); *Langston* v. *Wilson McShane Corp.*, 828 N.W.2d 109, 116 (Minn. 2013).

The disagreement between the Virginia Supreme Court and the regional federal court of appeals for that State heightens the urgent need for this Court's intervention. See *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 762 (1994) (noting that Court had granted certiorari to resolve a conflict between state high court and regional court of appeals). Like this case, *Hopkins* involved a former spouse attempting to claim payment under an ERISA plan following a vesting event. 105 F.3d at 155. At the time of the divorce, the participant had been ordered to pay alimony to the former spouse, but no QDRO had been entered. *Id.* at 154. The participant then re-married, and designated the spouse as beneficiary of any survivor benefits under an ERISA plan. *Id.* at 154-155. After the participant retired, the former spouse obtained orders from a family court both to collect against the pension and to be named recipient of the surviving spouse benefits. *Id.* at 155. The plan administrator disputed the validity of the state-court order purporting to displace the current spouse as the surviving spouse beneficiary. *Ibid.* After considering "the overall framework of ERISA," *id.* at 156, the Fourth Circuit agreed with the plan administrator that "the Surviving Spouse Benefits vested in [the current spouse] at the time of [the plan participant's] retirement," *id.* at 157, making the state court's purported reassignment unenforceable, see *ibid.*

Two other circuits have adopted similar rules. In *Rivers*, the Fifth Circuit considered whether a former spouse could obtain pension benefits when the plan specified that the current spouse was the plan beneficiary. 186 F.3d at 682. The court "agree[ed] with the Fourth Circuit's decision in *Hopkins* and adopt[ed] its rationale," *id.* at 683, denying the former spouse's claim because the benefits irrevocably vested in the current spouse upon the participant's retirement, *id.* at 683-684.

The Third Circuit has also rejected a former spouse's claim for pre-retirement survivor's benefits under an ERISA plan "in the absence of * * * a QDRO" establishing such an interest at the time the plan participant died. *Samaroo*, 193 F.3d at 187. Rejecting the claims of a former spouse (whose ex-husband had not remarried), the court affirmed the district court's decision that "entitlement to a survivor's annuity in respect of [the husband] had to be determined as of the day [he] died." *Id.* at 189.[3]

[3] *Files* v. *ExxonMobil Pension Plan*, 428 F.3d 478 (3d Cir. 2005), which held that a former spouse could obtain an order *nunc pro tunc* to qualify a DRO obtained before her former husband's death, is not to the contrary. First, unlike here, the property settlement agreement in *Files* both identified the pension fund by name (stating that the former spouse "was entitled to one-half of the Exxon pension and one-half the Exxon . . . [Savings] Account") *and* spoke explicitly in the language of ERISA (stating "[t]he transfer shall be by QDRO"). *Id.* at 480. Second, *Files* explicitly acknowledged *Samaroo*'s reliance on *Hopkins* and distinguished the Fourth Circuit decision on grounds

The Minnesota Supreme Court likewise has "adopt[ed] the rule that surviving spouse benefits generally vest under ERISA at the time of the plan participant's retirement." *Langston*, 828 N.W.2d at 116. In *Langston*, a couple divorced, the husband remarried, and the husband had a joint and survivor annuity benefits that named his current spouse as beneficiary. *Id.* at 111-112. After the husband retired, the former spouse sought a QDRO to enforce the interest in these benefits arising from the divorce decree. *Id.* at 112. Relying in large part on *Hopkins*, the court held that "consistent with ERISA's goal of ensuring the predictable and uniform administration of benefits," "surviving spouse benefits generally vest under ERISA at the time of the plan participant's retirement." *Id.* at 116.

2. In conflict with those decisions, the court below joined three other circuits and one state high court in holding that state courts may issue QDROs that reassign benefits even after the right to those benefits has vested in a designated beneficiary under an ERISA plan. See *Patton* v. *Denver Post Corp.*, 326 F.3d 1148, 1154 (10th Cir. 2003); *Hogan* v. *Raytheon, Co.*, 302 F.3d 854, 856-857 (8th Cir. 2002); *Trustees of Dirs.*

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implicated here: "[I]n *Hopkins*," the *Files* court explained, "there was an attempt to divest benefits already vested in a subsequent spouse, whereas [in *Files*], there was no such vesting." *Id.* at 488 n.12. Indeed, *Files* cited with approval a decision that followed *Hopkins* "in preventing [a] first wife, who never put [the ERISA] plan on notice of [her] QDRO, from displacing [the] second wife as the surviving spouse as those benefits *vested in [the] second wife upon [her] husband's retirement*." *Ibid.* (citing *Singleton* v. *Singleton*, 290 F. Supp. 2d 767 (W.D. Ky. 2003) (emphasis added)).

Guild of America-Producer Pension Benefits Plans v. *Tise*, 234 F.3d 415, 426 (9th Cir. 2000); *Torres* v. *Torres*, 60 P.3d 798, 823 (Haw. 2002). In addition, since the decision below, a panel of another federal court of appeals has joined this side of the split, over a vigorous dissent. See *Nicholls*, 2015 WL 3498771.

In *Tise*, the Ninth Circuit ruled that ERISA "necessarily permits an alternate payee who has obtained a state law DRO before the plan participant's retirement, death, or other benefit-triggering event to perfect the DRO into a QDRO thereafter." 234 F.3d at 422. According to the Ninth Circuit, ERISA does not explicitly require a pre-vesting QDRO and various other provisions support its conclusion that state courts could retroactively divest a beneficiary of an interest in benefits. See *id.* at 421-423.[4]

Like the Fourth Circuit's *Hopkins* decision, the Ninth Circuit's decision has spawned a line of cases following its reasoning. Relying on *Tise*, the Eighth Circuit concluded that it was "irrelevant" that a plan participant had "died prior to the entry of" a state court order that retroactively awarded surviving spouse benefits to his former wife. *Hogan*, 302 F.3d at 857.

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[4] In *Carmona* v. *Carmona*, the Ninth Circuit held that "the rule enunciated in *Hopkins* is the proper rule for [Qualified Joint and Survivor Annuity] benefits," 603 F.3d 1041, 1057 (2008), but only in narrow circumstances not present here where there is *no* state court order addressing the former spouse's interests in place at the time a subsequent beneficiary's interest vests. The court took care to emphasize that it was "not disturb[ing] [its] prior holding in *Tise*." *Id.* at 1060.

The Tenth Circuit, in turn, relied on *Hogan* to reach a similar conclusion. Noting that *Hogan* had "held that a domestic relations order can be qualified posthumously," 326 F.3d at 1153 (citation omitted), *Patton* concluded that QDROs are an area "for which the *nunc pro tunc* doctrine is appropriate[,]" since "[c]ourts in domestic relations contexts must have the power to effect equitable settlements by responding to newly acquired information or to changes in circumstances." *Id.* at 1154. The court specifically rejected the Third Circuit's contrary holding in *Samaroo*. See *id.* at 1153.

After the decision below, a divided panel of the Second Circuit concluded that a Connecticut state court could validly enter a QDRO retroactive to the date of a plan participant's divorce years earlier, with the effect of posthumously reassigning ERISA pension benefits from the participant's current spouse to a former spouse. The majority rejected the argument that the putative QDROs were "invalid because they were entered after [the participant's] death," holding that the surviving spouse "d[oes] not gain an automatic and irrevocable interest in [the participant's] plan benefits on the date of his death" that would prevent a state court from posthumously entering a QDRO to reassign benefits. *Nicholls*, 2015 WL 3498771, at *5, *7. The majority acknowledged the contrary decisions discussed above but found their reasoning unpersuasive. *Id.* at *7 n.7. Judge Wesley, who long served as a state-court judge before joining the federal bench, dissented in relevant part, reasoning that the benefits vested in the plan participant's current spouse upon the participant's pre-retirement death and could not be reassigned. Holding that ERISA permits state courts to reassign benefits after a vesting event—the plan participant's retirement or pre-retirement death—was, Judge Wesley observed, "a conclusion of seismic consequences" that would "thwart[] the intricate federal statutory scheme surrounding the antialienation of pension benefits." *Id.* at 10.

The state courts are in conflict too. In *Torres*, the Supreme Court of Hawaii was required to choose between the conflicting positions of *Hopkins*, *Rivers*, and *Samaroo*, on one hand, and *Tise*, *Hogan*, and *Patton* on the other. See 60 P.3d at 814. After surveying the unsettled state of the law, *id.* at 814-823, that court decided to follow *Tise*. *Id.* at 823. It held that a state "family court's * * * DRO d[id] not interfere with * * * rights to pension benefits payable before the date that the [party] qualifies the DRO." *Id.* at 825.[5]

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[5] This sharp conflict is evident in decisions of federal district courts and state intermediate appellate courts. At least six federal district courts and three state courts of appeals have followed *Hopkins*: *VanderKam* v. *Pension Benefit Guar. Corp.*, 943 F. Supp. 2d 130, 138-144 (D.D.C. 2013), *aff'd sub nom. VanderKam* v. *VanderKam*, 776 F.3d 883 (D.C. Cir. 2015); *Board of Trs. of Ind. State Council of Plasterers & Cement Masons Pension Fund* v. *Steffens*, No. 4:12CV513 JCH, 2012 WL 5207499, at *5 (E.D. Mo. Oct. 22, 2012); *Guzman* v. *Commonwealth Edison Co.*, No. 99 C 582, 2000 WL 1898846, at *2-3 (N.D. Ill. Dec. 28, 2000); *Singleton*, 290 F. Supp. 2d at 770; *Stahl* v. *Exxon Corp.*, 212 F. Supp. 2d 657, 668-673 (S.D. Tex. 2002); *Davenport* v. *Robert H. Davenport, D.D.S., M.S., P.A.*, 146 F. Supp. 2d 770, 779-780 (M.D.N.C. 2001); *In re Marriage of Norfleet*, 612 N.E.2d 939, 943 (Ill. App. Ct. 1993); *Hayes* v.

3. The court below purported to distinguish *Hopkins* on the theory that the plan at issue there involved an annuity whereas the Plan here does not. App., *infra*, 43a. That will not do. This Court has already considered and rejected the suggestion that the protections Congress provided for surviving spouses through ERISA depend on the form of the spousal benefit. In *Boggs* v. *Boggs*, 520 U.S. 833 (1997), the Court observed that, even for individual account plans that are *exempted* from the special requirements imposed on annuity plans by 29 U.S.C. § 1055, "Congress still protects the interests of the surviving spouse by requiring those plans to pay the spouse the nonforfeitable accrued benefits." *Id.* at 843.[6]

Hayes, 994 So. 2d 246, 249 (Miss. Ct. App. 2008); and *Ross* v. *Ross*, 705 A.2d 784, 797 (N.J. Super. Ct. App. Div. 1998). In contrast, at least four federal district courts and one state intermediate appellate court have followed *Tise*: *Marker* v. *Northrop Grumman Space & Missions Sys. Corp. Salaried Pension Plan*, No. 04 C 7933, 2006 WL 2873191, at *8 (N.D. Ill. Oct. 4, 2006); *National City Corp. Non-Contributory Ret. Plan* v. *Ferrell*, No. 1:03 CV 259, 2005 WL 2143984, at *4-7 (N.D. W. Va. Sept. 1, 2005); *IBM Sav. Plan* v. *Price*, 349 F. Supp. 2d 854, 857-860 (D. Vt. 2004); *Payne* v. *GM/UAW Pension Plan*, No. CIV.A. 95-CV-73554DT, 1996 WL 943424, at *4 (E.D. Mich. May 7, 1996); and *Eller* v. *Bolton*, 895 A.2d 382, 402-403 (Md. Ct. Spec. App. 2006).

[6] The decision below dismissed *Boggs*' discussion as dicta because it appears in a section addressing an annuity covered by § 1055. See App., *infra*, at 22a-23a. That this Court's statement can be characterized as dicta, however, does not make it an inaccurate description of the law. This Court has treated survivor's annuity and lump-sum benefits identically in other decisions, as well. See *Kennedy*, 555 U.S. at 293 ("[A] surviving spouse has a right to a survivor's annuity *or to a lump-sum*

Even if this Court had not already rejected the lower court's distinction between annuities and lump-sum benefits, that distinction would not explain away *Hopkins*. *Hopkins* did not rely solely on the text of Section 1055. To the contrary, the Fourth Circuit sought to announce a rule that "not only is consistent with the overall framework of ERISA, but also balances the competing interests of the former and current spouses." *Hopkins*, 105 F.3d at 157.

4. In *Nicholls*, the Second Circuit panel majority also purported to distinguish the Fourth Circuit's decision in *Hopkins* and the Fifth Circuit's decision in *Rivers* because they "were decided before the Pension Protection Act of 2006," Pub. L. 109-280, 120 Stat. 780. 2015 WL 3498771, at *7 n.7. As Judge Wesley explained in dissent, "[t]his is irrelevant because the 2006 Act does not address the competing claims to [the] benefits vesting question here or in those cases." *Id.* at *11 n.4 (Wesley, J., concurring in part and dissenting in part). In fact, as Judge Wesley noted, the Department of Labor—"the agency entrusted by Congress to explain this thorny area of ERISA" —has continued to rely on those decisions even after the 2006 Act. *Ibid.*

* * *

By enacting ERISA, "Congress minimized the need for interstate employers to administer their plans dif-

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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." (citing *Boggs*, 520 U.S. at 843, and 29 U.S.C. §§ 1055(a), (b)(1)(C), (c)(2)) (emphasis added).

ferently in each State in which they have employees." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 105 (1983). The existing sharp division of authority undermines the congressional goal of national uniformity. This Court's review is warranted to resolve this entrenched split.

B. The Decision Below Is Wrong

No one disputes that, when Mr. Griffin died, the Plan documents named petitioner as his beneficiary. No one claims that the 1996 divorce documents met the statutory requirements for a QDRO or that petitioner ever consented to the naming of other beneficiaries under the Plan. The question presented is whether ERISA permits a state court to issue a post-death order retroactively changing Mr. Griffin's beneficiary designation. The answer is no.

1. To determine when benefits vest, ERISA directs courts to look first to the plan documents. See *US Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537, 1548 (2013) ("The statutory scheme, * * * is built around reliance on the face of written plan documents" (internal quotation marks and citation omitted)); accord 29 U.S.C. § 1102(a)(1) ("Every employee benefit plan shall be established and maintained pursuant to a written instrument."). Indeed, "[t]he plan * * * is at the center of ERISA," "and an administrator must act 'in accordance with the documents and instruments governing the plan' insofar as they accord with the statute." *US Airways*, 133 S. Ct. at 1548 (quoting 29 U.S.C. § 1104(a)(1)(D)). This Court has repeatedly upheld the so-called "plan documents rule," even and

especially when it conflicts with the requirements of state law.[7]

Here, the plain terms of the Plan establish that the benefits at issue vested in petitioner at the time of Mr. Griffin's death. Under the heading "Death Benefits," Mr. Griffin's Plan states that:

> If you die while employed by Dominion, the entire value of your account is distributed to your beneficiary, including the value of all Company Matching contributions that *automatically become vested upon your death.*
>
> Federal law requires that, if you are married when you die, *your spouse must receive the distribution unless she or he approved your choice of another (or an additional) beneficiary before your death*. Your spouse must agree to your choice of that beneficiary by signing the spousal consent portion of a Beneficiary Authorization Form obtained from [the Plan administrator]. The form must have been completed, signed, notarized, and returned to [the Plan administrator] before your death.

App., *infra*, 79a-80a (emphasis added).[8]

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[7] See, *e.g.*, *Kennedy*, 555 U.S. 285 (upholding the plan administrator's decision to pay savings and investment benefits to the decedent's former wife in conformity with the plan documents, even though the former wife was divested of her interest in any retirement plan under state law); *Egelhoff*, 532 U.S. 141 (striking down a Washington state law that required plan administrators to consider documents outside the plan documents).

[8] As noted earlier (see note 2, *supra*), the Plan documents also provide that "if you are divorced, benefit payments from

2. The text of ERISA confirms this understanding. ERISA unequivocally provides that "benefits provided under the plan may not be assigned or alienated," 29 U.S.C. § 1056(d)(1) (2012), unless there is a valid QDRO or spousal consent. *Id.* at §§ 1056(d)(3)(A), 1055(c)(2)(A). As discussed above, it is undisputed that the Plan documents named petitioner as the Plan beneficiary, that neither the PSA nor the final divorce decree is a QDRO, and that the petitioner did not consent to any changes in the designation of the Plan's beneficiary. See App., *infra*, 2a-3a. Yet the Supreme Court of Virginia concluded that, because the final divorce decree vested certain rights in Mr. Griffin's children as a matter of Virginia state law, petitioner may be retroactively divested of her rights under the Plan. *Id.* at 1a (adopting the reasoning of the Virginia Court of Appeals); *id.* at 29a-32a. That conclusion, however, conflicts with federal law under ERISA, which directs plan administrators to award benefits to the beneficiary designated in plan documents, unless a QDRO has been obtained or the spouse has consented to an alternate beneficiary.

Here, respondent had 14 years to obtain a QDRO that would have secured the children's interest in the Plan benefits under federal law, but she failed to do so. Upon Mr. Griffin's death, the benefits vested in his surviving spouse under federal law and the Plan's explicit terms. See App., *infra*, 10a (Millette, J.,

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the * * * Plan may be made to your former spouse, your child, or other dependent only in response to a Qualified Domestic Relations Order." App., *infra*, 81a. But, again as noted earlier, it is common ground in this case that no QDRO was entered before Mr. Griffin's death.

dissenting). This gave petitioner an irrevocable interest in the benefits under ERISA.

3. Allowing Virginia law to control disbursement under the Plan runs counter to congressional purpose for at least two reasons. First, the decision below burdens plan administrators in just the way that Congress sought to avoid. See *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142 (1990) (stating that ERISA was intended to "minimize the administrative and financial burden" faced by plan administrators). Rather than "simply identifying the beneficiary specified by the plan documents" at the time of the benefits-triggering event, the decision below would charge administrators with "master[ing] the relevant law of 50 states." *Egelhoff*, 532 U.S. at 148-149. In addition, plan administrators will not always be aware of divorce decrees at the time the plan calls for distribution, which could raise the prospect of personal financial liability should they pay the wrong beneficiary. Cf. 29 U.S.C. § 1109(a) (imposing personal liability on plan fiduciary "who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter"). For that reason as well, ERISA must be interpreted to provide administrators with a "straightforward" process for determining beneficiaries, thereby "allow[ing] * * * plans with participants and beneficiaries in multiple states to distribute benefits pursuant to a uniform standard." National Coordinating Committee for Multiemployer Plans Amicus Br. at 3, *Egelhoff* v. *Egelhoff*, 532 U.S. 141 (2001) (No. 99-1529).

Second, and just as importantly, Congress went to considerable lengths to "protect[] the surviving spouse of the participant employee." *Boggs* v. *Boggs*, 89 F.3d 1169, 1180 (5th Cir. 1996) (denying rehearing en banc) (Weiner, J., dissenting); *Boggs*, 520 U.S. at 843 ("[T]he Retirement Equity Act of 1984 (REA), Pub. L. 98-397, 98 Stat. 1426, enlarged ERISA's protection of surviving spouses in significant respects."). Applying Virginia law circumvents Congress' intention to "establish[] important rights to pension benefits for the surviving spouse of a participant." Br. for the United States as Amicus Curiae at 12, *Boggs* v. *Boggs*, 520 U.S. 833 (1997) (No. 96-79), 1996 WL 714742, at *10.

C. Failure To Resolve This Recurring Issue Will Undercut Important Interests In National Uniformity

Whether ERISA preempts state laws with respect to benefits that have already vested under federal law is of fundamental importance to plan administrators, beneficiaries, employees, and claimants nationwide. As Congress indicated when passing ERISA, "the continued well being and security of millions of employees and their dependents are directly affected by [employee benefit plans]; * * * [the plans] are affected with a national public interest [and] they have become an important factor affecting the stability of employment and the successful development of industrial relations." 29 U.S.C. § 1001(a).

Permitting state law to control disbursement under the Plan and others like it will disturb "the comprehensive nature of [ERISA], the centrality of pension and welfare plans in the national economy, and their importance to the financial security of the Nation's work force." *Boggs*, 520 U.S. at 839. A decision holding that a state judge can retroactively reassign ERISA benefits after the plan participant's death "thwarts the intricate federal statutory scheme surrounding the antialienation of pension benefits." *Nicholls*, 2015 WL 3498771, at *10 (Wesley, J., concurring in part and dissenting in part). This case thus "involves a matter that is at the heart of ERISA: the payment of retirement benefits from an ERISA plan." U.S. Br., *Boggs* v. *Boggs*, 520 U.S. 833 (1997), 1996 WL 714742, at *10.

1. With assets, contributions, and benefits reaching billions of dollars, clear guidance for ERISA plan administrators is "importan[t] to the financial security of the Nation's work force." *Boggs*, 520 U.S. at 839. For instance, in 2010, retirement income benefits received from private employer pension and profit sharing plans totaled $479 billion.[9] ProQuest, *Statistical Abstract of the United States: 2015*, at 369 tbl. 554 (2015). Of 401(k) plans, in 2011, total benefits amounted to $252,692,000,000, affecting 72,968,000 participants. *Id.* at 379 tbl. 572. And the U.S. Bureau of Labor Statistics recently found that 65% of workers in private industry were eligible for retirement benefits, with 48% of those employees taking advantage of those plans. News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, *Employee Benefits in the United States—March 2014* (July 25, 2014), *available*

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[9] Retirement income benefits in this country constitute a substantial amount of money. In 2010, those benefits totaled $1.5 trillion nationwide. Benefits provided by private employers constituted the second largest amount, second only to Social Security ($690 billion). ProQuest, *Statistical Abstract of the United States*: 2015, at 369 tbl. 554 (2015).

at www.bls.gov/news.release/pdf/ ebs2.pdf (discussing findings of National Compensation Survey).

2. The issue in this case is especially significant given high modern divorce rates. Roughly a million couples divorce every year in the United States, see CDC/NCHS National Vital Statistics System, *National Marriage and Divorce Rate Trends* (Feb. 19, 2015), http://goo.gl/eHJLXQ (listing number of divorces per year from 2005 to 2012), and 81.4% of men and 79.6% of women who divorced in 2013 participated in the labor force. U.S. Census Bureau, *2013 American Community Survey: S1251 Characteristics of People with a Marital Event in the Last 12 Months*, http://goo.gl/UXJJjm (last visited Apr. 19, 2015). Because surviving spouses will often be "unprepared financially for the death of the participant," H.R. Rep. No. 655, 98th Cong., 2d Sess., Pt. 1, at 28 (1984), this Court should take special care to prevent States from imposing "conflicting requirements," *Fort Halifax Packing Co.*, 482 U.S. at 10, about when and how such surviving spouses can be deprived of benefits following the death of a participant.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2015

In the Supreme Court of Virginia

Record No. 140350

Court of Appeals No. 1177-13-1

Kimberley COWSER-GRIFFIN, Executrix of the Estate of David Griffin,

Appellant,

versus

Sandra D.T. GRIFFIN,

Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

(February 26, 2015)

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that the Court of Appeals of Virginia did not err.

For the reasons stated in the majority opinion of the Court of Appeals in *Griffin v. Griffin,* 62 Va. App. 736, 753 S.E.2d 574 (2014), the judgment of the Court of Appeals is affirmed. The appellant shall pay to the appellee two hundred and fifty dollars damages.

This order shall be certified to the Court of Appeals of Virginia and to the Circuit Court of Sussex County, and shall be published in the Virginia Reports.

Justice KELSEY took no part in the consideration of this case.

Justice MILLETTE, with whom Chief Justice LEMONS and Senior Justice KOONTZ join, dissenting.

Because I conclude that ERISA-governed death benefits successfully vested in his surviving spouse at David Griffin's death, and are therefore not subject to limitation by a posthumously entered Qualified Domestic Relations Order (QDRO), I must respectfully dissent.

In 1996, in the course of their original divorce action, David and Sandra Griffin entered into a Property Settlement Agreement (PSA) in which they agreed to name their children as beneficiaries in "401(k) plans and other such plans which would be distributed upon the death of either party." This PSA was incorporated into their 1998 final divorce decree.

David Griffin died on May 26, 2012. At the time, he was actively employed at Dominion Power with an ERISA-governed Dominion Salaried Savings Plan (the Plan), which provides retirement and death benefits payable pursuant to ERISA. In this instance, upon the death of a Plan participant, the Plan documents provide for a lump sum payment to the surviving spouse unless the spouse explicitly consents to another beneficiary or unless a QDRO has been entered providing for an alternate beneficiary.

It is undisputed that Mr. Griffin's surviving spouse, Kimberly Cowser-Griffin, did not consent to the naming of other beneficiaries. It is likewise undisputed that neither the PSA or divorce decree met the statutory requirements for a QDRO. For this reason, Sandra Griffin now seeks entry of a posthumous QDRO to award the Griffin children Plan benefits.

I.

The majority concludes that nothing prevents posthumous QDROs. I agree that posthumous QDROs are at times permissible. Indeed, the regulations concerning timing of QDROs promulgated by the Labor Relations Board appear to permit posthumous QDROs, stating that a QDRO does not fail "solely because of the time at which it is issued," and illustrating this rule with an example involving the death of a participant. 29 C.F.R. § 2530.206(c)(1); *see also* 29 C.F.R. § 2530.206(c)(2) (ex. 1). If Mr. Griffin was unmarried at the time of his death with no designated beneficiaries, for example, I would agree that a posthumous QDRO would be permissible. However, those facts are not before the Court today.

Mr. Griffin did remarry, and at the time of his death his Plan reflected Mrs. Cowser-Griffin as both the named beneficiary and the default beneficiary under the Plan. The Plan, for ERISA purposes, had no record of anyone other than Mrs. Cowser-Griffin having an interest in his benefits. Thus, Mrs. Cowser-Griffin submits that at her husband's death she acquired a vested interest in the benefits under the Plan as his surviving spouse. At that point, the issue before this Court became distinguishable from an issue "solely" related to "timing" as set forth in 29 C.F.R. § 2530.206(c). The issue was no longer merely a matter of timing, but also one of vested interest.

It is undisputed that neither Sandra Griffin nor her children filed a QDRO with the Plan in the fourteen years between the 1998 final divorce decree and Mr. Griffin's death. The PSA and final divorce decree provided them with rights under state law, but not rights that were enforceable under ERISA. For the purposes of Virginia law, rights vest at the entry of a divorce decree that includes a domestic relations order (DRO). *See Himes v. Himes,* 12 Va. App. 966, 970, 407 S.E.2d 694, 697 (1991). For the purposes of ERISA, however, benefits may only be alienated in the presence of a QDRO meeting the provisions set forth in 29 U.S.C. § 1056(d).[1] *See* 29 U.S.C. § 1144(a) (setting forth ERISA's express preemption clause, providing that it "shall supersede any and all State laws insofar as they ... refer to any [covered] employee benefit plan"); *Hopkins v. AT & T Global Info. Solutions Co.,* 105 F.3d 153, 155-57 (4th Cir. 1997) (holding that a QDRO must be entered before

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[1] A DRO is a QDRO if it recognizes an alternate payee's rights to "benefits payable with respect to a participant under [an ERISA] plan." 29 U.S.C. § 1056(d)(3)(B). It must specify the name and mailing address of the alternate payee and the affected plan participant, the amount or percentage of the benefits to be paid or the means by which that amount will be determined, the number of payments or time period to which the order applies, and the plan to which the order applies. 29 U.S.C. § 1056(d)(3)(C). It also must not violate the restrictions set forth in 29 U.S.C. § 1056(d). An alternate payee seeking to establish a DRO as a QDRO must present the order to the Plan Administrator, who will timely inform him or her whether the DRO is qualified under ERISA. 29 U.S.C. § 1056(d)(3)(G).

interests have vested in a subsequent surviving spouse).

Certainly, the PSA and divorce decree in this case provided an interest that could have formed the basis of a subsequent QDRO to enforce these rights under ERISA at any time until the death of Mr. Griffin. If, at death, the benefits did not vest in Mrs. Cowser-Griffin, Sandra Griffin could still obtain a QDRO and enforce these rights. If, on the other hand, the benefits have vested in Mrs. Cowser-Griffin, the right to enforce the state domestic relations order was cut off at the time of vesting.[2]

Thus, the issue today is whether the funds vested in Mrs. Cowser-Griffin as beneficiary at Mr. Griffin's death.

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[2] It is worth noting that the term "vesting" has a slightly more limited scope in its common usage for retirement account purposes than the traditional legal definition used in this discussion. The Plan documents and 29 U.S.C. § 1055 refer to "vesting" and "vested participants," respectively: this usage, common to retirement accounts, pertains to the time at which a participant obtains a nonforfeitable right to all or part of his or her account. *See* 29 U.S.C. § 1055(h). This vesting essentially addresses the rights of the participant vis-à-vis his or her employer: the status of a benefit as "vested" under colloquial retirement language does not have any bearing on the status of the participant's rights versus any third parties, such as spouses or children, claiming that benefit. It is thus distinguishable from the traditional legal sense, defined as "[h]aving become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute <a vested interest in the estate>." Black's Law Dictionary 1794 (10th ed.2014).

II.

An inquiry to determine the time of vesting must begin with the Plan documents:

> ERISA's principal function [is] to protect contractually defined benefits. The statutory scheme, we have often noted, is built around reliance on the face of written plan documents. "Every employee benefit plan shall be established and maintained pursuant to a written instrument," [29 U.S.C.] § 1102(a)(1), and an administrator must act "in accordance with the documents and instruments governing the plan" insofar as they accord with the statute, [29 U.S.C.] § 1104(a)(1)(D). The plan, in short, is at the center of ERISA.

US Airways v. McCutchen, 569 U.S. ----, ---, 133 S. Ct. 1537, 1548 (2013) (some internal quotation marks and citations omitted).

Under the heading "Death Benefits," David Griffin's Plan states that:

> If you die while employed by Dominion, the entire value of your account is distributed to your beneficiary, including the value of all Company Matching contributions that automatically become vested upon your death.
>
> Federal law requires that, *if you are married when you die,* your spouse must receive the distribution unless she or he approves your choice of another (or an additional) beneficiary before your death. Your spouse must agree to your choice of that beneficiary by signing the spousal consent portion of a Beneficiary

> Authorization Form obtained from ACS. The form must have been completed, signed, notarized, and returned to ACS before your death.[3,4]

Based upon the amount in David Griffin's account at the time of his death, the Plan also dictated that a payment to a surviving spouse would be made in a lump sum payment.

The Plan documents, in combination with relevant statutes, afford the basis for this Court to conclude that the benefits at issue became vested in Mrs. Cowser-Griffin at the time of Mr. Griffin's death. This result is consistent with the majority of ERISA case law, which treats the retirement or death of a participant as a vesting event for the surviving spouse beneficiary.[5]

In *Hopkins,* 105 F.3d at 154-55, the United States Court of Appeals for the Fourth Circuit considered the case of a former spouse attempting to garnish her ex-husband's ERISA benefits to collect unpaid alimony by means of a QDRO. The ex-husband had retired but was still living, and at the time of his

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[3] QDROs are mentioned in the Plan as a method of recognizing the rights of an alternate payee, but the Plan does not go into detail as the requirements are set forth by statute.

[4] Although David Griffin changed his beneficiaries from his children to his wife in violation of the PSA after he remarried, had he not done so, Mrs. Cowser-Griffin would still be the beneficiary under the Plan pursuant to the requirements of ERISA absent a QDRO or Mrs. Cowser-Griffin's notarized consent.

[5] Whether the vesting event is retirement or death depends on the type of benefits involved and whether the participant passed away during his or her employment.

retirement had been remarried. The first wife sought a QDRO to garnish two kinds of ERISA benefits: pension benefits to the participant and surviving spouse benefits.

The Fourth Circuit was the first to examine the issue of when vesting occurs for an ERISA beneficiary of surviving spouse benefits. The court concluded that vesting of surviving spouse benefits occurs at retirement, and for this reason the surviving spouse benefits could not be subject to a QDRO. *Id.* at 156; *accord Samaroo v. Samaroo,* 193 F.3d 185, 190 (3d Cir. 1999).

The Fourth Circuit relied on the general finality of surviving spouse benefits in ERISA at the time of retirement to conclude that the benefit vests at retirement in the spouse to whom the participant is married at retirement. *Hopkins,* 105 F.3d at 156-57. After retirement, under 29 U.S.C. § 1055, the court stated, such benefits cannot be changed even by the participant. *Id.* at 157. In essence, those benefits therefore irrevocably belong to the spouse to whom the participant is married at retirement.

Unlike the instant case, the court in *Hopkins* evaluated an annuity subject to 29 U.S.C. § 1055. However, the distinction between the participant's and the beneficiary's benefits that drove the court's reasoning is also true for Mr. Griffin and his surviving spouse. The determinative factor, that the form of the benefit becomes fixed at the vesting event, is just as true in this instance in which the Plan mandates a lump sum payment to the surviving spouse.

Additionally, the Fourth Circuit explicitly noted that the need for expedient administration or calculation of annuities, while not inconsistent with the holding, was *not* the basis for its decision. *Hopkins,* 105 F.3d at 157, n. 7 ("Although ERISA and the terms of the plan, and not matters of administrative convenience, determine a person's pension rights, it is worth noting that our holding does not burden the efficient management of the plan.") In short, ERISA's protections of the rights of surviving spouse are equally applicable to non-annuitized benefits.

The United States Court of Appeals for the Ninth Circuit similarly held in *Carmona v. Carmona,* 603 F.3d 1041, 1057-58 (9th Cir. 2010), that "a state [domestic relations order] may not create an enforceable interest in surviving spouse benefits to an alternate payee after a participant's retirement, because ordinarily at retirement the surviving spouse's interest irrevocably vests." While not identical in their reasoning, *Hopkins* and *Carmona* share similar rationales, reach the same conclusion, and represent the most cohesive guidance as to how to approach posthumous QDROs for surviving spouse benefits. The notion that vesting of surviving spouse benefits occurs at the retirement or death of a participant has been adopted by other courts and is worth this Court's considered attention today. *See also Rivers v. Central & S.W. Corp.,* 186 F.3d 681, 683-84 (5th Cir. 1999) ("[B]enefits irrevocably vested in [the second wife] on the date of [her husband's] retirement," and plaintiff's failure to obtain a QDRO prior to her ex-husband's retirement forever barred her from acquiring any interest in the plan.); *Langston v. Wilson McShane Corp.,* 828 N.W.2d 109, 114-16 (Minn. 2013) (reviewing case law nationally on the issue and adopting the *Hopkins-Carmona* approach).

An obvious distinction between the survivor benefits at issue in this case and those in the persuasive cases cited above is that those cases pertained to benefits that were designated *upon retirement* as surviving spouse benefits. The instant case involves a 401(k)-type benefit that would have presumably been paid out to the Plan participant had he not died during his employ, but instead resulted in death benefits to a surviving spouse.

This has, I conclude, no substantive impact on the outcome. Had Mr. Griffin retired and lived, his (likely depleting) benefits would have continued to be subject to a QDRO, had Sandra Griffin decided to seek one. During the course of his life, Mr. Griffin could perpetually be bound to abide by his divorce decree by means of a QDRO. Yet his death during his employ altered those benefits into surviving spouse benefits, which under the preemptive powers of ERISA made them the irrevocable property of a beneficiary who was not a party to the final divorce decree. Sandra Griffin has no power to enforce a QDRO against Mrs. Cowser-Griffin: she was not a party to the original divorce proceedings.

The very provision that excepts the benefit at issue from 29 U.S.C. § 1055 does so based on the fact that it is fully payable at death to the surviving spouse in a lump sum amount: it is a surviving spouse benefit. 29 U.S.C. § 1055(b)(1)(C). The same mandates protecting the surviving spouse that form the irrevocability of the benefits in *Carmona* and *Hopkins* at retirement apply to this benefit at the time of the participant's death.

III.

The majority opinion of the Court of Appeals, the reasoning of which is affirmed today, begins its analysis setting forth the reasons that the benefits at issue are excepted from 29 U.S.C. § 1055. That opinion, in fact, devotes nearly five pages of analysis to this undisputed point; the benefits in this case clearly fall under the 29 U.S.C. § 1055(b)(1)(C) exception.

The majority takes such pains to distinguish the case at bar from the statute solely to convince this Court to ignore the guidance by the High Court of our nation in *Boggs v. Boggs,* 520 U.S. 833, 117 S. Ct. 1754, 138 L.Ed.2d 45 (1997), addressing Congressional intent to protect the rights of surviving spouses:

> [T]he Retirement Equity Act of 1984 (REA), Pub. L. 98-397, 98 Stat. 1426, enlarged ERISA's protection of surviving spouses in significant respects. Before REA, ERISA only required that pension plans, if they provided for the payment of benefits in the form of an annuity, offer a qualified joint and survivor annuity as an option entirely within a participant's discretion. REA modified ERISA to permit participants to designate a beneficiary for the survivor's annuity, other than the non-participant spouse, *only when the spouse agrees.* Congress' concern for surviving spouses is also evident from the expansive coverage of § 1055, as amended by REA. Section 1055's requirements, as a general matter, apply to all "individual account plans" and "defined benefit plans." The terms are defined, for § 1055 purposes, so that all pension plans fall within those two categories. *While some individual*

> *account plans escape § 1055's surviving spouse annuity requirements under certain conditions, Congress still protects the interests of the surviving spouse by requiring those plans to pay the spouse the nonforfeitable accrued benefits, reduced by certain security interests, in a lump-sum payment.*

Id. at 843, 117 S. Ct. 1754 (emphasis added) (internal citations omitted).

The final sentence refers, of course, to the conditions of the instant case. The majority emphasizes that this sentence is dicta because *Boggs* pertained to an annuity covered by 29 U.S.C. § 1055.

Whether the statement is dicta does not make the analysis any less accurate. REA did offer a comprehensive scheme to strengthen protections for surviving spouses under 29 U.S.C. § 1055, and the few individual accounts excepted from 29 U.S.C. § 1055 are still accorded surviving spouse protections by the provisions of this section requiring that surviving spouses be the named beneficiary or consent to an alternate payee. *See* 29 U.S.C. § 1055(b)(1)(C). While nothing stated in *Boggs* might have the precedential force to dictate this Court's decision today, we are nonetheless considering an issue of federal law upon which the Supreme Court of the United States has seen fit to expound. This Court should not lightly dismiss that exposition: Congress created a comprehensive statutory structure to protect the rights of surviving spouses. The systemic policy in ERISA that protects surviving spouses applies equally to lump sum payments to surviving spouses excepted from 29 U.S.C. § 1055.

In light of the consensus that annuity plans vest in beneficiaries at the retirement or death of the participant, in the absence of a credible reason to treat lump sum payment plans differently for the purposes of vesting, and bearing in mind that ERISA is structured with a policy preference toward protecting the interests of the surviving spouse, I conclude that Mrs. Cowser-Griffin's benefits vested upon the death of her husband. Upon vesting, it became impossible for Sandra Griffin to obtain entry of a Qualified Domestic Relations Order.

Court of Appeals of Virginia,
Chesapeake

Sandra D.T. GRIFFIN
v. Record No. 1177-13-1.

David L. GRIFFIN,
Deceased, c/o Kimberly
Cowser-Griffin,
Executrix of the Estate of
David L. Griffin.

(Jan. 28, 2014)

J. Roger Griffin, Jr. (Christie, Kantor, Griffin, Smith & Harris, P.C., Virginia Beach, on brief), for appellant.

W. Hunter Old (Christopher T. Page; Kaufman & Canoles, P.C., Williamsburg, on brief), for appellee.

Present: HUMPHREYS, BEALES and HUFF, JJ.

HUMPHREYS, Judge.

Sandra D.T. Griffin ("Mrs. Griffin") appeals the order of the Circuit Court of Sussex County ("circuit court") denying her request for entry of a qualified domestic relations order ("QDRO"), which she pursues so that a certain term of her prior divorce decree might be enforced. For the following reasons, we reverse the circuit court's order.

I. BACKGROUND

"When reviewing a [circuit] court's decision on appeal, we view the evidence in the light most favorable to the prevailing party, granting it the benefit of any reasonable inferences." *Congdon v. Congdon,* 40 Va. App. 255, 258, 578 S.E.2d 833, 835 (2003). However, the facts relevant to the resolution of this appeal are undisputed.

David L. Griffin ("Mr. Griffin") and Mrs. Griffin were married on March 20, 1987 and had two children, James J. Griffin, III, born on October 25, 1987, and Gloria D. Griffin, born on July 6, 1992. The parties were divorced by a final decree of divorce entered in the circuit court on August 12, 1998. The final decree of divorce ("final decree") incorporated the Separation and Property Settlement Agreement (hereinafter, "PSA" or "Agreement") entered into by the parties on August 30, 1996. The Agreement term that is the subject of this appeal reads: "The parties agree to name the children of the marriage as co-beneficiaries under all 401K Plans and other such plans which would be distributed upon the death of either party."

At the time of his death, Mr. Griffin was employed by Dominion Virginia Power ("Dominion"). At Dominion, he qualified for retirement benefits and he elected a 401(k) plan, known as Dominion's Salaried Savings Plan ("Salaried Savings Plan" or "Plan"), which is governed by the Employee Retirement Income Security Act ("ERISA"). The Salaried Savings Plan is a defined contribution plan designed to encourage retirement savings. Dominion's contributions to the plan depend on the participant's contributions and years of service. There is no actuarial analysis to determine the participant's benefits, and the participant's life expectancy is not a consideration in the Salaried Savings Plan. Under the Salaried Savings Plan, the surviving spouse is the beneficiary upon the participant's death unless she has consented to another beneficiary. The Salaried Savings Plan documents also provide that "if you are divorced, benefit payments from the Pension Plan or Savings Plan may be made to your former spouse, your child, or other dependent only in response to a Qualified Domestic Relations Order (QDRO)." The Dominion Plan Administrator testified that the Salaried Savings Plan is not a survivor annuity and it is strictly payable to the designated beneficiary.

In 2002, Mr. Griffin had named his children as his beneficiaries. However, Mr. Griffin married Kimberly Cowser-Griffin ("Cowser-Griffin") in 2007, and in 2008 Mr. Griffin named Cowser-Griffin as his beneficiary for most of his funds, including the Salaried Savings Plan.[1] He named his children only as contingent beneficiaries on the Salaried Savings Plan. Shortly after his marriage to Cowser-Griffin, Mr.

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[1] Mr. Griffin also had a special retirement account that was included as part of his Dominion Power Pension Plan. The special retirement account goes to the named beneficiary if the participant dies before retirement. Mr. Griffin named Cowser-Griffin as the beneficiary of the special retirement account.

In Mrs. Griffin's original motion before the circuit court, she stated that both the Salaried Savings Plan and the special retirement account under his Pension Fund are both subject to a QDRO and the focus of her motion. However, the proposed QDRO only names the Salaried Savings Plan, and not the Dominion Power Pension Plan or special retirement account that Mrs. Griffin mentions in her original motion and her brief. The circuit court only addressed the Dominion Salaried Savings Plan, and Mrs. Griffin did not note any specific objection stating that the circuit court failed to address additional plans or funds. Therefore, we only address the Dominion Salaried Savings Plan as it was the only plan addressed in the proposed QDRO.

Griffin was diagnosed with renal cell cancer. He died on May 26, 2012. He had not retired from Dominion. No party had applied for a QDRO or notified the Dominion Plan Administrator of an alternate payee for the Salaried Savings Plan. In October 2012, Mrs. Griffin sent a draft QDRO to Dominion. Dominion's Plan Administrator responded that the proposed domestic relations order ("DRO") would not be treated as a QDRO in light of *Board of Trustees of the Indiana State Council of Plasterers & Cement Masons Pension Fund v. Steffens,* Case No. 4:12CV513 JCH, 2012 WL 5207499 (E.D. Mo. 2012), a case concerning a domestic relations order entered after the plan participant's death. However, Dominion continued an administrative hold on Mr. Griffin's Salaried Savings Plan benefits pending the outcome of the litigation concerning the proper beneficiary under the Plan.

The circuit court ruled that it had jurisdiction to reinstate the parties' divorce case upon the docket "for such purposes as may be necessary to grant full relief to all parties," citing Code § 20-121.1, and that Code § 20-107.3(K) grants the circuit court continuing authority and jurisdiction "to make any additional orders necessary to effectuate and enforce any order entered pursuant to [equitable distribution]." The circuit court clarified that if it were to enter the QDRO it would not be modifying the final decree's incorporation of the property settlement agreement, "but rather would effectuate and enforce such an order by entry of a QDRO." However, the circuit court denied Mrs. Griffin's request to enter a proposed QDRO, finding that "under controlling federal law, without a preexisting QDRO, Mr. Griffin's retirement benefits in the Dominion Salaried Savings Plan vested entirely in the designated beneficiary and surviving spouse, [Cowser-Griffin], once the plan participant passed away." The circuit court found that under federal case law,

> at the time of retirement or preretirement death the former spouse must have perfected a QDRO at the time the benefits became payable, or that in order to effect a postmortem qualification of the domestic relations order ("DRO") as a QDRO, there must have been a DRO awarding the interest in the pension plan and substantially complying with ERISA's QDRO specificity requirements at the time the benefits became payable. Alternatively, Ms. Sandra Griffin could have put the plan on notice of her children's interest in the benefits. Ms. Griffin failed to perfect a QDRO prior to Mr. Griffin's passing, and the final decree of divorce and the PSA do not qualify as a QDRO. Further, there is no evidence in the record that any notice of the children's potential claim under the PSA was ever provided to the Plan at any time before the plan participant's death. Thus, Defendant's Motion for Entry of the [QDRO] is denied.

Mrs. Griffin timely appealed to this Court.

II. ANALYSIS

Mrs. Griffin's assignment of error is that "[t]he trial court erred in ruling that the court could not properly enter a qualified domestic relations order under the circumstances of the case." "We review the [circuit] court's statutory interpretations and legal conclusions *de novo*." *Navas v. Navas,* 43 Va. App.

484, 487, 599 S.E.2d 479, 480 (2004) (quoting *Sink v. Commonwealth,* 28 Va. App. 655, 658, 507 S.E.2d 670, 671 (1998)).

The disbursement of Mr. Griffin's Salaried Savings Plan falls under the federal Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.,* as stated in the Salaried Savings Plan documents and because it is an "employee pension benefit plan" as defined in 29 U.S.C. § 1002(2). An "employee pension benefit plan" or "pension plan" includes a plan maintained by an employer that provides retirement income to employees or deferred income for employees regardless of the method of calculating the benefits under the plan or the method of distributing benefits from the plan. 29 U.S.C. § 1002(2).

The principal goal of ERISA is to provide "a set of standard procedures to guide processing of claims and disbursement of benefits." *Egelhoff v. Egelhoff,* 532 U.S. 141, 148, 121 S. Ct. 1322, 1328, 149 L.Ed.2d 264 (2001). 29 U.S.C. § 1144(a) provides that the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." The legislative intent behind ERISA was to establish a uniform administrative scheme governing employee benefit plans to prevent the employer from being subject to differing regulatory requirements in differing states. *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 9, 107 S. Ct. 2211, 2216, 96 L.Ed.2d 1 (1987). The United States Supreme Court has "not hesitated to enforce ERISA's preemption provision where state law created the prospect that an employer's administrative scheme would be subject to conflicting requirements." *Id.* at

10, 107 S. Ct. at 2216.

A. 29 U.S.C. § 1055 Does Not Apply to the Salaried Savings Plan

Congress enacted the Retirement Equity Act of 1984 ("REA") which "enlarged ERISA's protection of surviving spouses in significant respects." *Boggs v. Boggs,* 520 U.S. 833, 843, 117 S. Ct. 1754, 1761, 138 L.Ed.2d 45 (1997). The enlarged protections in REA are codified in 29 U.S.C. § 1055. Pursuant to the statutory language, 29 U.S.C. § 1055 applies to,

> (A) any defined benefit plan,
>
> (B) any individual account plan which is subject to the funding standards of section 302 [29 USCS § 1082], and
>
> (C) any participant under any other individual account plan[2] *unless*—
>
> (i) such plan provides that the participant's non-forfeitable 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 subsec-

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> [2] The term "individual account plan" or "defined contribution plan" means a pension plan which provided for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

29 U.S.C. § 1002(34).

> tion (c)(2), to a designated beneficiary),[3]
>
> (ii) such participant does not elect the payment of benefits in the form of a life annuity, and
>
> (iii) with respect to such participant, such plan is not a direct or indirect transferee (in a transfer after December 31, 1984) of a plan which is described in subparagraph (A) or (B) or to which this clause applied with respect to the participant.

29 U.S.C. § 1055(b)(1) (footnotes added). While § 1055 governs most pension plans with surviving spouse benefits, it provides an exception for some individual account plans. Mr. Griffin's estate concedes that the Dominion Salaried Savings Plan is one such plan excepted by the statutory language. Mr. Griffin's estate, however, relies on language from *Boggs* stating that *all* pension plans are governed by § 1055, and thus, he argues that despite the statutory exception, the Salaried Savings Plan is nevertheless regulated by § 1055.

> Congress' concern for surviving spouses is also evident from the expansive coverage of § 1055, as amended by REA. Section 1055's require-

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[3] The chief point of contention between the majority and the dissent lies in the applicability of this latter parenthetical language. Contrary to the view of the dissent, we conclude that the language set off in these parentheses after the word "spouse" is inapplicable in this case because the Salaried Savings Plan "is payable in full, on the death of the participant, to the participant's surviving spouse." 29 U.S.C. § 1055(b)(1)(C)(i). The Salaried Savings Plan thus meets these requirements to be excepted from § 1055 application, and therefore we need not look past the opening parenthesis and immediately following "or" for other situations to which the exception applies.

> ments, as a general matter, apply to all "individual account plans" and "defined benefit plans." § 1055(b)(1). The terms are defined, for § 1055 purposes, so that all pension plans fall within those two categories. See § 1002(35). While some individual account plans escape § 1055's surviving spouse annuity requirements under certain conditions, Congress still protects the interests of the surviving spouse by requiring those plans to pay the spouse the nonforfeitable accrued benefits, reduced by certain security interests, in a lump-sum payment. § 1055(b)(1)(C).

Boggs, 520 U.S. at 843, 117 S. Ct. at 1761-62.

First, we note that the above quoted language from *Boggs* is dicta and we note that, contrary to the assertion of Mr. Griffin's estate, the *Boggs* Court's choice of words actually is that § 1055 applies "*as a general matter* ... to all 'individual account plans' and 'defined benefit plans.'" *Id.* (emphasis added). Thus, we do not read *Boggs* as a judicial revision of the statutory language designed to eliminate exceptions created by Congress. In *Boggs,* the pension plan at issue in the above quoted analysis was a "qualified joint and survivor annuity mandated by ERISA" in 29 U.S.C. § 1055(a) and (d)(1), *id.* at 842, 117 S. Ct. at 1761, and not an individual account plan as is the case here.[4] Because the Supreme Court was *not* faced

[4] We note that the deceased plan participant in *Boggs* did receive a lump-sum distribution from his employer's savings plan upon his retirement. *Boggs,* 520 U.S. at 836, 117 S. Ct. at 1758. However, he rolled the lump sum distribution into an Individual Retirement Account ("IRA"), and the Court analyzed

with deciding whether a particular individual account plan fell within the statutory exception to 29 U.S.C. § 1055, as provided in § 1055(b)(1)(C), the Court's interpretation that § 1055 applies to all individual account plans is dicta and not binding precedent. *See Camreta v. Greene,* ---U.S. ----, ----, 131 S. Ct. 2020, 2045, 179 L.Ed.2d 1118 (2011) (dicta remarks do not establish law or qualify as binding precedent).

The fact that 29 U.S.C. § 1055(b)(1)(C) requires excepted plans to pay a surviving spouse the participant's nonforfeitable accrued benefits in a lump-sum payment does not mean that the other provisions of § 1055 apply to those plans. While § 1055(b)(1)(C) does require excepted plans to pay a surviving spouse the participant's nonforfeitable accrued benefits in a lump-sum payment, this requirement is one of three to be met for an individual account plan to be *excepted* from § 1055; it would be illogical to conclude that § 1055 applies to an individual account plan excepted by the language of the statute itself.

Additionally, the fact that the Salaried Savings Plan requires spousal consent in the same manner as provided in 29 U.S.C. § 1055(c)(2) does not mean that § 1055 applies to the Plan. In fact, the statute itself contemplates that excepted plans may require spousal consent "in the manner required under sub-

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the proper beneficiary of the IRA separately from the qualified joint and survivor monthly annuity payments payable to the surviving spouse from the employer's retirement program. The Court addressed the qualified joint and survivor annuity with a thorough analysis of § 1055 in Section III of the opinion, and while the IRA was addressed in the following section, the IRA was *not* addressed in the Court's § 1055 analysis. *Id.* at 836-37, 842, 844-45, 117 S. Ct. at 1758-59, 1761, 1762-63.

section (c)(2).” 29 U.S.C. § 1055(b)(1)(C)(i). Accordingly, while an ERISA governed plan may require consent in the manner provided in 29 U.S.C. § 1055(c)(2), it may escape § 1055 application. Such is the case here where the Salaried Savings Plan requires spousal consent in the manner provided in 29 U.S.C. § 1055(c)(2). The Salaried Savings Plan meets § 1055‘s requirements for excepted plans because (1) the Plan provides that the participant’s benefits are payable in full to the surviving spouse upon the participant’s death, (2) Mr. Griffin did not elect to receive benefits in the form of a life annuity, and (3) there is no evidence or allegations that the Salaried Savings Plan is a transferee of a previous plan. Moreover, as stated *supra,* Mr. Griffin’s estate concedes that the Salaried Savings Plan is excepted from § 1055 application. Therefore, the Plan is not subject to the regulations that apply to joint and survivor annuities and pre-retirement survivor annuities pursuant to § 1055, nor does the case law interpreting the § 1055 annuity regulations apply.

B. ERISA Allows for Assignment or Alienation of Plan Benefits Pursuant to a QDRO

Turning to Mrs. Griffin’s proposed QDRO, we must determine whether it meets the statutory requirements for a QDRO, and if it does, it is not preempted. *Boggs,* 520 U.S. at 848, 117 S. Ct. at 1764. In other words, enforceability of Mrs. Griffin’s interest “ultimately depends on whether a state court order is qualified under ERISA.” *Langston v. Wilson McShane Corp.,* 828 N.W.2d 109, 116 (Minn. 2013).

ERISA generally obligates administrators to manage ERISA plans “in accordance with the documents and instruments governing them." 29 U.S.C. § 1104(a)(1)(D). "At a more specific level, the Act requires covered pension benefit plans to 'provide that benefits ... under the plan may not be assigned or alienated,' [29 U.S.C.] § 1056(d)(1), but this bar does not apply to qualified domestic relations orders (QDROs), [29 U.S.C.] § 1056(d)(3)." *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan,* 555 U.S. 285, 288, 129 S. Ct. 865, 868, 172 L.Ed.2d 662 (2009). "The QDRO provision is an exception not only to ERISA's rule against assignment of plan benefits but also to ERISA's broad preemption of state law." *Trs. of the Dirs. Guild v. Tise,* 234 F.3d 415, 420 (9th Cir. 2000) (citing 29 U.S.C. § 1144(b)(7)). 29 U.S.C. § 1056(d)(3)(A) provides,

> Paragraph (1) [stating benefits may not be assigned or alienated] shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. *Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.*

(Emphasis added).

The Dominion Salaried Savings Plan provides under the heading "Death Benefits, Your Beneficiary":

> If you die while employed by Dominion, the entire value of your account is distributed to your beneficiary, including the value of all

> Company Matching contributions that automatically become vested upon your death.
>
> Federal law requires that, *if you are married when you die,* your spouse must receive the distribution unless she or he approved your choice of another (or an additional) beneficiary before your death. Your spouse must agree to your choice of that beneficiary by signing the spousal consent portion of a Beneficiary Authorization Form obtained from ACS. The form must have been completed, signed, notarized, and returned to ACS before your death.

However, the Salaried Savings Plan document includes the 29 U.S.C. § 1056(d)(3)(A) requirement by stating: "if you are divorced, benefit payments from the Pension Plan or Savings Plan may be made to your former spouse, your child, or other dependent only in response to a Qualified Domestic Relations Order (QDRO)."

The term "domestic relations order" is defined as "any judgment, decree, or order (including approval of a property settlement agreement) which—(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and (II) is made pursuant to a State domestic relations law...." 29 U.S.C. § 1056(d)(3)(B)(ii). A "qualified domestic relations order" is a domestic relations order "which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan," and meets the requirements of subparagraphs (C) and

(D):

> (C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies—
>
> (i) the name and last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,
>
> (ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined.
>
> (iii) the number of payments or period to which such order applies, and
>
> (iv) each plan to which such order applies.
>
> (D) A domestic relations order meets the requirements of this subparagraph only if such order—
>
> (i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,
>
> (ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and
>
> (iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

29 U.S.C. § 1056(d)(3). If the DRO qualifies as a

QDRO, then the person who is an alternate payee under the QDRO is considered a beneficiary under the plan. 29 U.S.C. § 1056(d)(3)(J).

The circuit court provided the following reasoning for denying entry of Mrs. Griffin's proposed QDRO: 1) The final decree and the PSA did not substantially comply with ERISA's QDRO specificity requirements at the time the benefits became payable, thus preventing a postmortem qualification of either DRO (the final decree or PSA) as a QDRO; 2) Mr. Griffin's retirement benefits in the Salaried Savings Plan vested entirely in Cowser-Griffin as the designated beneficiary and surviving spouse once Mr. Griffin died, and; 3) The Plan was not put on notice of alternate payees prior to the plan participant's death.

We hold that the circuit court erred in its analysis denying entry of the QDRO for the following reasons.

C. The QDRO is the Tool by which State Courts Can Enforce Marital Property Settlements

The Griffin PSA was incorporated into the final decree of divorce, and its terms should be enforced by the circuit court. The Code of Virginia provides for reinstatement of divorce suits to allow parties to obtain full relief:

> In any suit which has been stricken from the docket, and in which complete relief has not been obtained, upon the motion or application of either party to the original proceedings, the same shall be reinstated upon the docket for such purposes as may be necessary to grant full relief to all parties.

Code § 20-121.1. "[M]arital property settlements entered into by competent parties upon valid consideration for lawful purposes are favored in the law and such will be enforced unless their illegality is clear and certain." *Derby v. Derby,* 8 Va. App. 19, 25, 378 S.E.2d 74, 77 (1989) (quoting *Cooley v. Cooley,* 220 Va. 749, 752, 263 S.E.2d 49, 52 (1980)). More generally, "when a contract has been made, and either party refuses to perform the agreement, equity enforces the performance of the contract specifically, by compelling the refractory party to fulfill his engagement according to its terms." *Dunsmore v. Lyle,* 87 Va. 391, 392, 12 S.E. 610, 611 (1891). Thus, as the legality of the PSA incorporated into the final decree is uncontested, the circuit court is responsible for enforcing its terms under state law.

The parties agreed in the PSA to "name the children of the marriage as co-beneficiaries under all 401(k) plans and other such plans which would be distributed upon the death of either party." Although Mr. Griffin initially named his children as beneficiaries, he later changed the designated beneficiary on the Salaried Savings Plan to Cowser-Griffin and named the children only as contingent beneficiaries. Thus, Mr. Griffin clearly breached the terms of the PSA by naming Cowser-Griffin as the beneficiary to his Salaried Savings Plan.

When a party breaches the terms of a property settlement agreement by failing to name beneficiaries on ERISA-governed accounts in accordance with the agreement, the only way for the circuit court to enforce the agreement is to issue a QDRO. 29 U.S.C. § 1056(d)(3); *Kennedy,* 555 U.S. at 288, 129 S. Ct. at 868 (ERISA prohibits assignment or alienation of benefits governed by the plan except in the case of a

QDRO). "The QDRO provisions of ERISA do not suggest that a former spouse has no interest in the plans until she obtains a QDRO, they merely prevent her from enforcing her interest until the QDRO is obtained." *Gendreau v. Gendreau,* 122 F.3d 815, 819 (9th Cir. 1997). A spouse's "interest in the pension plans (or, at a minimum, her right to obtain a QDRO which would in turn give her an interest in the plans) was established under state law at the time of the divorce decree." *Id.* at 818. "State family law can ... create enforceable interests in the proceeds of an ERISA plan, so long as those interests are articulated in accord with the QDRO provision's requirements." *Tise,* 234 F.3d at 420; *see also Turner v. Turner,* 47 Va. App. 76, 79, 622 S.E.2d 263, 265 (2005) (this Court agreed with wife that the "QDRO simply was an administrative mechanism to effectuate the intent and purpose of the final decree's award").

D. A DRO May Be Revised to Meet the QDRO Requirements

While the PSA and final decree in this case do not meet the requirements of a QDRO, under state law a circuit court may make additional orders necessary to effectuate and enforce an order of the court. The circuit court has the authority to modify an order intended to affect or divide deferred compensation plans or retirement benefits for the purpose of establishing the order as a QDRO "or to revise or conform its terms so as to effectuate the expressed intent of the order." Code § 20-107.3(K)(4). Code § 20-107.3(K)(4) "'permits the court to revise its orders to comply with language required by federal law to effectuate the intended pension award, but not to substantively change the pension award itself.'"

Craig v. Craig, 59 Va. App. 527, 539, 721 S.E.2d 24, 30 (2012) (quoting *Irwin v. Irwin,* 47 Va. App. 287, 297 n. 8, 623 S.E.2d 438, 443 n. 8 (2005)).

Further, in the Pension Protection Act of 2006, Congress makes clear that a QDRO will not fail solely because the order is issued after, or revises, another domestic relations order; nor will it fail solely because of the time at which it is issued. Pub. L. No. 109-280, § 1001, 120 Stat. 780, 1001 (2006). Congress mandated that the Secretary of Labor issue regulations under ERISA to this end:

> Not later than 1 year after the date of the enactment of this Act, the Secretary of Labor shall issue regulations under section 206(d)(3) of the Employee Retirement Security Act of 1974 and section 414(p) of the Internal Revenue Code of 1986 which clarify that—
>
> (1) *a domestic relations order otherwise meeting the requirements to be qualified domestic relations order...shall not fail to be treated as a qualified domestic relations order solely because—*
>
> (A) *the order is issued after, or revises, another domestic relations order or qualified domestic relations order;* or
>
> (B) of the time at which it is issued[.]

Id. (emphasis added). Thus, both the Pension Protection Act of 2006 and the Code of Virginia permit revisions to a DRO, as long as the revisions do not substantively change the award itself, in order to produce a QDRO.

In this case, it does not matter that the final decree and PSA were not QDROs because it is permissible under both federal and state law that an order issued after and revising these domestic relations orders can become a QDRO. Further, the proposed QDRO did not make any substantive changes to the benefits agreed upon in the final decree and PSA, the substantive portion of which is: "The parties agree to name the children of the marriage as co-beneficiaries under all 401K Plans and other such plans which would be distributed upon the death of either party." The proposed QDRO provides "The Alternate Payees [James J. Griffin, III, and Gloria D. Griffin] shall be entitled to One Hundred Percent (100%) of the Member's vested account under the Plan to be divided equally between them, fifty percent (50%) each." The crux of both of these provisions is equal distribution of death benefits from the 401(k) Salaried Savings Plan to the children. While the DROs did not meet the specificity requirements of a QDRO, the purpose of the proposed QDRO is to meet these specificity requirements, as permitted by the federal and state laws.

E. The Proposed QDRO Meets ERISA's Specificity Requirements

The proposed QDRO meets the specificity requirements found in 29 U.S.C. § 1056(d)(3). The proposed QDRO includes the information required by § 1056(d)(3)(C): (1) the names and mailing addresses of Mr. Griffin, the plan participant, and his children, the alternate payees, (2) the percentage of benefits each alternate payee should be paid, fifty-percent each, (3) the number of payments to which the order applies, single cash sums or "such other form of distribution as may be elected by the Alternate Payees under the terms of the Plan," and (4) the plan to which the order applies, the interest of Mr. Griffin in the Dominion Salaried Savings Plan.

In accordance with 29 U.S.C. § 1056(d)(3)(D)(i), the proposed QDRO does not require the Salaried Savings Plan to provide a type or form of benefit, or any option, not otherwise provided under the Plan. The proposed QDRO seeks one hundred percent of the benefits vested in Mr. Griffin's Salaried Savings Plan in the form of a single cash sum or other distribution as the children may elect under the Plan. This is consistent with the Salaried Savings Plan which provides, "If you die while employed by Dominion, the entire value of your account is distributed to your beneficiary, including the value of all Company matching contributions that automatically become vested upon your death," and "Non-spousal Beneficiaries must elect to receive the balance of your Account in an immediate lump sum payment or in annual payments totaling the balance of your Account that conclude within five (5) years after the date of your death."

The fact that the proposed QDRO names beneficiaries other than Cowser-Griffin does not change the form of benefit. 29 U.S.C. § 1056(d)(3)(E)(i)(III) provides,

> A domestic relations order shall not be treated as failing to meet the requirements of [29 U.S.C. § 1056(d)(3)(D)(i)] solely because such order requires that payment of benefits be made to an alternate payee ... in any form in which such benefits may be paid under the plan to the participant (other than in the form

> of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

Here, the Salaried Savings Plan is not a joint and survivor annuity, but rather a defined contribution plan.[5] *See* 29 U.S.C. § 1002(34). Also, the Plan allowed Mr. Griffin to receive the entire balance of his account at any time after his retirement. Thus, the request in the proposed QDRO for the children, and not Cowser-Griffin, to receive payment of the benefits, in lump sum or other option available to them under the Plan, does not run afoul of the requirement that the QDRO only require a form of benefit already provided by the Plan.

The regulations issued by the Department of Labor pursuant to the Pension Protection Act of 2006 in the form of illustrative examples, apply to this case,[6] and Examples 1 and 4 of 29 C.F.R.

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[5] A "qualified joint and survivor annuity" is an annuity

> for the life of the participant with a survivor annuity for the life of the spouse which is equal to the applicable percentage of the amount of the annuity which is payable during the joint lives of the participant and the spouse, and (ii) which is the actuarial equivalent of a single annuity for the life of the participant. Such term also includes any annuity in the form having the effect of an annuity described in the preceding sentence.

29 U.S.C. § 1055(d). The Salaried Savings Plan is not an annuity and is not based on actuarial calculations; it is a defined contribution plan. The Plan benefits are based on the participant's contributions, Dominion's matching contributions, and the investment earnings on the contributions. A specific retirement benefit is not guaranteed; rather the Salaried Savings Plan is designed to encourage retirement savings.

[6] Where Congress has expressly delegated authority to an

§ 2530.206(d) specifically support the conclusion that the proposed QDRO in this case conforms to the "type or form of benefit" requirement of 29 U.S.C. § 1056(d)(3)(i). In 29 C.F.R. § 2530.206(d)(2)(ex. 1) the "Participant and Spouse divorce, and their divorce decree provides that the parties will prepare a [DRO] assigning 50 percent of Participant's benefits under a 401(k) plan to Spouse to be paid in monthly installments over a 10-year period." Participant then dies while actively employed. *Id.* "A [DRO] consistent with the divorce decree is subsequently submitted to the 401(k) plan; however, the plan does not provide for 10-year installment payments of the type described in the order." *Id.* The example provides that "the order does not fail to be treated as a QDRO solely because it is issued after the death of Participant, but the order would fail to be a QDRO ... because the order requires the plan to provide a type or form of benefit, or any option, not otherwise provided under the plan." *Id.*

The example provided in 29 C.F.R. § 2530.206(d)(2) (ex. 4) is also applicable to this case: Participant retires and begins receiving benefit payments in the form of a straight life annuity based on the life of participant, and spouse waived her surviving spousal rights. Participant then divorces spouse after the annuity start date and presents the plan with a DRO "that eliminates the straight life

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agency to elucidate a specific provision of a statute by regulation as it did in the Pension Protection Act of 2006, as cited *supra,* "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. NRDC, Inc.,* 467 U.S. 837, 843-44, 104 S. Ct. 2778, 2782, 81 L.Ed.2d 694 (1984).

annuity based on Participant's life and provides for Spouse, as alternate payee, to receive all future benefits in the form of a straight life annuity based on the life of Spouse. The plan does not allow reannuitization with a new annuity starting date." *Id.*

> [T]he order does not fail to be a QDRO solely because it is issued after the annuity starting date, but the order would fail to be a QDRO ... because the order requires the plan to provide a type or form of benefit, or any option, not otherwise provided under the plan. However, the order would not fail to be a QDRO ... if instead it were to require all of Participant's future payments under the plan to be paid instead to Spouse, as an alternate payee (so that payments that would otherwise be paid to the Participant during the Participant's lifetime are instead to be made to the Spouse during the Participant's lifetime).

Id.

In this case, the relevant benefit is the funds in a 401(k) payable in a lump sum, which is essentially what the proposed QDRO requests to be paid to the children. The proposed QDRO does not call for a change in the type or form of benefit such as payment over a term not offered by the Plan or a reannuitization not allowed under the Plan.

The proposed QDRO also meets the last two requirements in 29 U.S.C. § 1056(d)(3)(D). It does not call for the Plan to provide increased benefits determined on actuarial values, 29 U.S.C. § 1056(d)(3)(D)(ii), as Mr. Griffin's Salaried Savings Plan benefits were not based on actuarial calculations, but only the sum of his contributions, Dominion's matching contributions, and the investment earnings on those contributions. Further, the proposed QDRO does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee pursuant to a previously entered QDRO, 29 U.S.C. § 1056(d)(3)(D)(iii), as there is no previously entered QDRO in this case.

F. The Timing of the Proposed QDRO Does Not Cause it to Fail

The fact that the proposed QDRO was not entered before the circuit court or to the Plan until after Mr. Griffin's death does not cause it to fail. As previously mentioned, in the Pension Protection Act of 2006 Congress ordered the Secretary of Labor to enter regulations clarifying that a DRO shall not fail to be treated as a QDRO solely because of the time at which it issued. 29 C.F.R. § 2530.206(c) gives examples illustrating how a DRO shall not fail to be treated as a QDRO solely because of the time at which it is issued. 29 C.F.R. § 2530.206(c)(2)(ex. 1) provides that a QDRO does not fail to be treated as a QDRO solely because it is issued after the death of the participant who died while actively employed and the order was subsequently submitted to the plan:

> Example (1). Orders issued after death. Participant and Spouse divorce, and the administrator of Participant's plan receives a domestic relations order, but the administrator finds the order deficient and determines that it is not a QDRO. Shortly thereafter, Participant dies while actively employed. A second domestic relations order correcting the defects in the

> first order is subsequently submitted to the plan. The second order does not fail to be treated as a QDRO solely because it is issued after the death of the Participant. The result would be the same even if no order had been issued before the Participant's death, in other words, the order issued after death were the only order.

Thus, in the present case, the proposed QDRO should not fail solely because it was not entered prior to Mr. Griffin's death, and the fact that the Plan was not on notice of an alternate payee is of no consequence according to the last sentence of the instruction example in the applicable federal regulation.

G. The Plan Benefits Did Not Vest in Cowser-Griffin upon Mr. Griffin's Death

The circuit court concluded that "under controlling federal law" Mr. Griffin's retirement benefits in the Salaried Savings Plan vested entirely in Cowser-Griffin at the moment of Mr. Griffin's death. However, federal law does not dictate that the benefits vested in Cowser-Griffin at Mr. Griffin's death; rather, ERISA generally obligates administrators to manage ERISA plans "in accordance with the documents and instruments governing them." 29 U.S.C. § 1104(a)(1)(D). In this case, the Salaried Savings Plan documents only refer to "vesting" in terms of benefits vesting in the participant's account. The Salaried Savings Plan does not address the vesting of benefits in a spouse or other beneficiary, but rather defines vesting as the participant's "non-forfeitable right to part or all of the value of [his] account." The Plan states that the participant is "always vested in the value of [his] employee Pre-tax, After-tax, and Rollover contributions and the investment earnings on those contributions," and is vested in company matching contributions and their earnings after three years of service. While the Plan requires spousal consent for a participant to designate a beneficiary other than his current spouse as the recipient of the funds vested in the participant's account, it also provides that a QDRO may assign the participant's Salaried Savings Plan benefits to a former spouse, child, or other dependent.

Moreover, ERISA contemplates situations where a benefit becomes payable, but a court or the plan administrator takes months to determine if a DRO qualifies as a QDRO. 29 U.S.C. § 1056(d)(3)(H) provides:

> (i) During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this subparagraph referred to as the "segregated amounts") which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.
>
> (ii) If within the 18-month period described in clause (v) the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest

> thereon) to the person or persons entitled thereto.
>
> * * * * * *
>
> (iv) Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in clause (v) shall be applied prospectively only.

Thus, a proposed QDRO does not automatically fail solely because a benefit has become payable and the correct beneficiary or beneficiaries are not yet determined. This statute provides for the situation of this case where a QDRO would be presented to the plan administrator after benefits become payable and the proper beneficiary is not yet determined or may have to be re-determined; this runs contrary to the circuit court's finding that benefits automatically vest in the surviving spouse where there is no preexisting QDRO.[7] The court in *Tise* likewise interpreted 29 U.S.C. § 1056(d)(3)(H): "the statute necessarily permits an alternate payee who has obtained a state law DRO before the plan participant's retirement, death, or other benefit-triggering event to perfect the DRO into a QDRO thereafter (subject to the 18-month period after which any previously-due benefits are payable to the original beneficiary)." *Tise,* 234 F.3d at 422-23.

Hopkins v. AT & T Global Information Solutions

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[7] Our analysis is confined to the Salaried Savings Plan at issue in this case, to which 29 U.S.C. § 1055 does not apply. We recognize that different vesting rules may apply to joint and survivor annuities, preretirement survivor annuities, or other plans to which 29 U.S.C. § 1055 does apply.

Co., 105 F.3d 153 (4th Cir. 1997), is the case Mr. Griffin's estate relies on as the "keystone case on the issue of vested rights for surviving spouses." *Hopkins* is easily distinguishable from the present case because of the form of benefit at issue in the case. In *Hopkins,* husband retired and began receiving pension benefits in the form of a qualified joint and survivor annuity, where he received a fixed income for his life ("pension benefits"), and if his spouse at retirement survived him, she would receive 50% of that fixed income for the remainder of her life ("surviving spouse benefits"). *Id.* at 154-55. Also, if husband died prior to retirement, pension benefits would be paid to his spouse as preretirement survivor annuity. *Id.* at 155 n.1. Husband's former spouse sought judgment to collect alimony against husband's pension benefits and against his current spouse's (also his spouse at retirement) surviving spouse benefits. The state court granted two judgment orders, one against the pension benefits and one against the surviving spouse benefits. *Id.* at 155. AT & T conceded that the order concerning the pension benefits was a QDRO, but argued that "because the Surviving Spouse Benefits had already vested in [the current spouse], the Surviving Spouse Order is not a QDRO." *Id.*

The Fourth Circuit noted that the question of whether a participant's current spouse has a vested interest in the surviving spouse benefits is a question of first impression on the federal courts and pointed out that ERISA does not explicitly state when a current spouse's interest in the surviving spouse benefits vests. *Id.* at 156. "However, after carefully reviewing the overall framework of ERISA, especially the provisions governing joint and survivor annuities, we conclude that the Surviving Spouse Benefits vest in the participant's current spouse on the date the participant retires." *Id.* The *Hopkins* court relied on the strict regulations that specifically apply to joint and survivor annuities and the accompanying surviving spouse benefits set forth in 29 U.S.C. § 1055 as support for its holding that the participant's spouse at the time of retirement has a vested interest in the surviving spouse benefits. *Id.* at 156-57. The court also noted that because the disbursement of the plan benefits is "based on actuarial computations, the plan administrator must know the life expectancy of the person receiving the Surviving Spouse Benefits to determine the participant's monthly Pension Benefits. As a result, the plan administrator needs to know, on the day the participant retires, to whom the Surviving Spouse Benefits is payable." *Id.* at 157 n. 7. Additionally, the court noted that a former spouse could obtain an interest in the participant's pension benefits by obtaining a QDRO at any time, as the former spouse did. *Id.* at 157.

As the surviving spouse benefits in *Hopkins* were a product of a joint and survivor annuity regulated by 29 U.S.C. § 1055, *Hopkins* is not persuasive on the subject of vesting as Mr. Griffin's estate suggests because the Salaried Savings Plan is exempted from § 1055 application. Further, unlike the plan in *Hopkins,* Mr. Griffin's Salaried Savings Plan benefits do not depend on actuarial calculations of the life of Mr. Griffin or Cowser-Griffin, or provide defined retirement benefits to Cowser-Griffin for the span of her life as predicted at Mr. Griffin's death or retirement.

Mr. Griffin's estate also relies on *Carmona v. Carmona,* 544 F.3d 988 (9th Cir. 2008), to support his argument that Mr. Griffin's benefits vested in Cowser-Griffin on the date of his death. However, like *Hopkins,* the benefits at issue in *Carmona* are qualified joint survivor annuity benefits. The court concluded, "once a participant retires, the spouse at the time becomes the 'surviving spouse' entitled to the QJSA benefits." *Id.* at 1002. "ERISA's surviving spouse benefits established in section 1055 were created in part 'to ensure a stream of income to surviving spouses.'" *Id.* (quoting *Boggs,* 520 U.S. at 843, 117 S. Ct. at 1761). Once again, the Salaried Savings Plan benefits at issue in this case do not qualify as surviving spouse annuity benefits established in 29 U.S.C. § 1055.

The United States Court of Appeals for the Ninth Circuit in *Hamilton v. Washington State Plumbing & Pipefitting Industry Pension Plan,* 433 F.3d 1091 (9th Cir. 2006), has also distinguished treatment of surviving spouse benefits regulated by 29 U.S.C. § 1055 from a participant's pension benefits upon his retirement or death. The court found that the rights of a surviving spouse to a preretirement survivor annuity, governed by 29 U.S.C. § 1055, are available only to a surviving spouse or a former spouse properly designated, but not available to children as alternate payees pursuant to a QDRO. *Id.* at 1101. However, the court noted that "designating children in a QDRO as alternate payees under a pension plan can provide a myriad of potential benefits to the children, depending on their ages, the date of the participant's disability, retirement, or death, and the participant's marital status." *Id.* Thus, the court distinguished the effectiveness of a QDRO entered against surviving spouse annuities regulated by 29 U.S.C. § 1055 and other pension benefits that are not § 1055 surviving spouse annuities.

The *Tise* court also drew a distinction between a participant's pension benefits, which were at issue before the court, and surviving spouse benefits pursuant to 29 U.S.C. § 1055:

> Whether a QDRO issued after a plan participant's retirement may affect the distribution of surviving spouse benefits pursuant to 29 U.S.C. § 1055 implicates statutory provisions and policy considerations other than those here applicable. *See* [*Hopkins,* 105 F.3d at 156-57]; *Rivers v. Central & South West Corp.,* 186 F.3d 681, 683-84 (5th Cir. 1999). We therefore leave to a case concerning § 1055 the determination whether, as *Hopkins* and *Rivers* determined, the plan participant's retirement cuts off a putative alternate payee's right to obtain an enforceable QDRO substituting the alternate payee for the surviving spouse with regard to statutory surviving spouse benefits.

Tise, 234 F.3d at 422 n. 6.

In the Commonwealth, it is well established that "'property rights and interests [become] vested in the parties when they [agree] upon them, set them forth in a valid separation agreement, and [have] them incorporated into their final divorce decree.'" *Irwin,* 47 Va. App. at 294, 623 S.E.2d at 441 (quoting *Himes v. Himes,* 12 Va. App. 966, 970, 407 S.E.2d 694, 697 (1991)). "Such an agreement creates vested property rights in the parties by virtue of the judicial sanction and determination of the court" and constitutes "a final adjudication of the property rights of the parties" to the divorce action. *Shoosmith v. Scott,* 217 Va. 290, 292, 227 S.E.2d 729, 731 (1976). Thus, the right of the children to the benefits of Mr. Griffin's 401(k) Salaried Savings Plan vested when the parties agreed to "name the children of the marriage as co-beneficiaries under all 401(k) plans and other such plans which would be distributed upon the death of either party." The QDRO is simply an administrative mechanism to enforce these rights that accrue under state law, and federal law has *not* overridden this mechanism by determining that the benefits of a plan excepted from 29 U.S.C. § 1055 vest in the surviving spouse at the participant's death. Thus, the benefit of the Commonwealth's law has not been pre-empted here.

III. CONCLUSION

Mrs. Griffin's proposed QDRO meets the specific requirements of 29 U.S.C. § 1056(d)(3). The Salaried Savings Plan escapes application of 29 U.S.C. § 1055, and the benefits did not vest in Cowser-Griffin at Mr. Griffin's death. Therefore, we reverse and remand with direction to the circuit court to enter the proposed QDRO.

Reversed and remanded.

HUFF, J., dissenting.

I respectfully dissent because the Salaried Savings Plan is, as the majority concluded, governed by ERISA, which pre-empts state law. *Boggs v. Boggs,* 520 U.S. 833, 841, 117 S. Ct. 1754, 1760, 138 L.Ed.2d 45 (1997) ("ERISA's express pre-emption clause states that the Act 'shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan....' [29 U.S.C.] § 1144(a).").[8] I depart from the analysis of the majority in their conclusion that the "Dominion Salaried Savings Plan is ... excepted by the statutory language" of 29 U.S.C. § 1055(b)(1)(C)(i), and is therefore alienable under state law. As suggested by its title, the exception provision of § 1055 relates to retirement plan annuities. The statutory language governing annuities is excepted when "the participant's nonforfeitable accrued benefit ... is payable *in full,* on the death of the participant *to the participant's surviving spouse.*" 29 U.S.C. § 1055(b)(1)(C)(i) (emphasis added). Moreover, the concession made by Mr. Griffin's estate was not that the Salaried Savings Plan was exempt from the federal act and therefore was alienable under state law. Rather, Mr. Griffin's estate was asserting that since the benefit is payable to the surviving spouse, in a lump sum, the statutory safeguards relating to annuities are not applicable and the surviving spouse is protected in the absence of a QDRO or spousal consent.[9] Being excepted from

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[8] The majority maintains that the *Boggs* decision dealt only with an annuity benefit, but the issues in that case, like the one before us, also covered a "lump-sum distribution from the [Employer] Savings Plan for Salaried Employees...." *Id.* at 836, 117 S. Ct. at 1758. Specifically, in analyzing the employee savings plan sums at issue, the *Boggs* Court noted, "While some individual account plans escape § 1055's surviving spouse annuity requirements under certain conditions, Congress still protects the interests of the surviving spouse by requiring those plans to pay the spouse the nonforfeitable accrued benefits...." *Id.* at 843, 117 S. Ct. at 1761-62.

[9] Specifically, Mr. Griffin asserts:

§ 1055 does not mean that the benefit is exempted from the policy or provisions of ERISA. *Boggs,* 520 U.S. at 843, 117 S. Ct. at 1761.

Mr. Griffin was employed by Dominion Virginia Power at the time of his divorce and until his death on May 26, 2012. Griffin was obligated, by the terms of the Griffin DRO, to name his two children as co-beneficiaries under any 401(k) and other similar plans. As part of his employment benefits, he participated in a pension plan, the Dominion Power Pension Plan, and a 401(k) type of plan, the Dominion Salaried Savings Plan. Griffin, however, did not comply with the terms of the Griffin DRO by naming his children as co-beneficiaries of any retirement benefits. Rather, when he remarried after his divorce from appellant, he named his new wife, Kimberly Cowser-Griffin ("Cowser-Griffin"), as the primary beneficiary and named his children as contingent beneficiaries. In the trial court, appellant requested a QDRO to enforce the terms of the Griffin DRO as applied to the Dominion Salaried Savings Plan.

As an employee benefit plan, the Plan is governed

[E]ven excepted pension plans must specifically require the participant's benefits to be paid to the surviving spouse, absent written consent to an alternate payee.... [W]hether classified as a Joint and Survivor Annuity, a Preretirement Survivor Annuity, or simply paid out as benefits under a 401(k) plan such as the Dominion Salaried Savings Plan, ERISA provides that all pension plan benefits are payable to the surviving spouse upon the death of the plan participant, absent written consent of that spouse to a different election by the participant.... Thus, the Salaried Savings Plan requires distribution to a surviving spouse unless a completed, signed and notarized consent is returned to the plan administrator before the plan participant's death.

by the Employee Retirement Income Security Act ("ERISA") and Dominion's plan documents.[10] Dominion's plan documents provide the specific payout method employed by the Plan Administrator to distribute benefits, requiring that the surviving spouse receive the funds unless written spousal consent is obtained prior to retirement or death. The Plan Administrator may deviate from this payout method only in response to a QDRO.

Fourteen years after the Griffin DRO was entered and approximately three months after Griffin's death, appellant filed a motion in the trial court seeking to reinstate the prior divorce proceedings and enter the proposed Griffin QDRO, preserving the beneficiary status for her children under the Plan. Prior to this motion, neither appellant nor her children had notified the Dominion Plan Administrator of any alleged interest in the benefits outlined in the Griffin DRO. Additionally, Cowser-Griffin did not provide spousal consent for any change in beneficiaries prior to Griffin's death. On May 6, 2013, the trial court denied appellant's motion, holding that the Plan's retirement benefits vested entirely in Cowser-Griffin as the designated beneficiary and surviving spouse under the Plan at Griffin's death.

"In determining whether the trial court made an error of law, 'we review the trial court's statutory interpretations and legal conclusions *de novo*.'" *Rollins v. Commonwealth,* 37 Va. App. 73, 78-79, 554 S.E.2d 99, 102 (2001) (quoting *Timbers v. Commonwealth,* 28 Va. App. 187, 193, 503 S.E.2d 233, 236

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[10] All parties concede that the Plan is an employment benefit plan or "pension plan" governed by ERISA.

(1998)).

On appeal, appellant contends that the trial court erred by denying her motion for entry of a qualified domestic relations order seeking to reinstate her children's beneficiary status as required under the Griffin DRO. Specifically, she asserts that her children's rights vested when the trial court entered the Griffin DRO; thus, the entry of a posthumous QDRO would enforce rights that vested prior to Griffin's death. In support of her assertion, she argues that because ERISA stipulates no deadline for a QDRO's entry after a plan participant's death, ERISA impliedly authorizes posthumous QDROs. She also states that the entry of a posthumous QDRO would not impair the Plan's administration because the Plan benefits are distributed in a lump sum to the beneficiaries, as opposed to an annuity payment. Alternatively, she argues that this Court should characterize the Griffin DRO as a QDRO and enter it *nunc pro tunc* to the date of the trial court's entry of the Griffin DRO. Cowser-Griffin intervened on behalf of the Estate of David Griffin and argues that her rights to the benefits vested upon Griffin's death because she was the surviving spouse and did not consent to any assignment of benefits. Accordingly, she asserts that the entry of a posthumous QDRO would divest her right as the surviving spouse. She also argues that this Court should not consider the Griffin DRO to be a QDRO and enter it *nunc pro tunc* because of its failure to conform to statutory requirements.

ERISA's purpose is "to ensure the proper administration of pension and welfare plans, both during the years of the employee's active service and in his or her retirement years." *Boggs,* 520 U.S. at 839, 117 S. Ct. at 1759. To effectuate this administration, ERISA implemented a preemption mandate, "supersed[ing] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA. 29 U.S.C. § 1144(a) (2006). Although ERISA requires that "benefits provided under the plan may not be assigned or alienated," 29 U.S.C. § 1056(d)(1), the Retirement Equity Act of 1984 ("REA"), Pub. L. 98-397, 98 Stat. 1426, amended ERISA to allow designation of a beneficiary other than the surviving spouse in two narrow circumstances: first, pursuant to a QDRO, 29 U.S.C. § 1056(d)(3)(A), and second, through spousal consent, 29 U.S.C. § 1055(c)(2)(A).

A DRO is defined as "any judgment, decree, or order (including approval of property settlement agreement) which ... relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant." 29 U.S.C. § 1056(d)(3)(B)(ii)(I). Conversely, a DRO is deemed to be a "qualified" DRO when it "creates or recognizes the existence of an alternate payee's rights to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan," and it meets certain substantive and specificity requirements. 29 U.S.C. § 1056(d)(3)(B)(i). It is the responsibility of the Plan Administrator "after receipt of [a DRO], ... [to] determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination." 29 U.S.C.

§ 1056(d)(3)(G)(i)(II).[11] A QDRO must meet the following substantive requirements:

> (i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,
>
> (ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and
>
> (iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

29 U.S.C. § 1056(d)(3)(D)(i)-(iii). Moreover, a QDRO must clearly specify:

> (i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,
>
> (ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined.
>
> (iii) the number of payments or period to which such order applies, and
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> (iv) each plan to which such order applies.

29 U.S.C. § 1056(d)(3)(C)(i)-(iv).

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[11] Additionally, § 1056(d)(3)(H)(i) states that a DRO may be determined a QDRO by "a court of competent jurisdiction."

In addition to allowing assignments of benefits pursuant to a QDRO, the REA further "enlarged ERISA's protection of surviving spouses" under § 1055, *Boggs,* 520 U.S. at 843, 117 S. Ct. at 1761, by requiring that before a plan participant could designate a beneficiary other than his or her spouse, the spouse had to provide written consent, 29 U.S.C. § 1055(c)(2)(A)(i)-(iii).[12] Section 1055 applies to all individual account plans unless the plan can meet certain requirements for exemption. *Boggs,* 520 U.S. at 841, 117 S. Ct. at 1760-61 ("Congress' concern for surviving spouses is also evident from the expansive coverage of § 1055, as amended by REA ... [which] appl [ies] to all 'individual account plans' and 'defined benefit plans.' The terms are defined, for § 1055 purposes, so that all pensions plans fall within those two categories."). Individual account plans are exempt from § 1055 if "such plan[s] provide[ ] that participant's nonforfeitable accrued benefit ... 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) of this* section, to a designated beneficiary)." 29 U.S.C. § 1055(b)(1)(C)(i) (emphasis added).[13] In other words, if spousal consent

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[12] A spouse properly waives his or her surviving spouse beneficiary designation *only when* "the spouse of the participant consents in writing to such election, such election designates a beneficiary (or form of benefits) which may not be changed without spousal consent ..., and the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public." *Id.*

[13] The majority suggests that the Plan meets this exception requirement of § 1055 as an individual account plan because the

is not properly obtained, the individual account plan fails to meet the exemption's requirements, and accordingly, falls within § 1055's expansive coverage over individual account plans. In accordance with these guidelines, the plan documents in this case require that the surviving spouse receives the distribution unless spousal consent to a change in the beneficiary designation is obtained prior to death.[14]

The central inquiry in this case is whether the beneficiary rights to the Plan vested at the trial court's entry of the Griffin DRO or when the benefits became payable upon Griffin's death. Indeed, vesting is the threshold question to whether a posthumous QDRO would be appropriate in this case because if in fact Cowser-Griffin's rights vested at Griffin's death, then a posthumous QDRO would divest her of the benefits to which she was entitled. Although the

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Plan distributes via a lump sum rather than an annuity payment. Subsection 1055(b)(1)(C)(i), however, requires not only a lump sum payout, but also specifically requires spousal consent to designate a non-spouse beneficiary.

[14] Under the subheading "Death Benefits," the plan documents stipulate,

> Federal law requires that, *if you are married when you die,* your spouse must receive the distribution unless she or he approved your choice of another (or an additional) beneficiary before your death. Your spouse must agree to your choice of that beneficiary by signing the spousal consent portion of a Beneficiary Authorization form obtained from ACS. The form must have been completed, signed, notarized, and returned to ACS before your death.

(Emphasis in original). Additionally, the plan documents only permit the Plan Administrator to pay distributions deviating from this designation "in response to a Qualified Domestic Relations Order."

vesting point of surviving spouse's benefits under ERISA is a case of first impression for this Court, this Court should follow the long line of precedent, including the Fourth Circuit and ERISA's own provisions, which provide that a surviving spouse's benefits are vested at the time of the participant's death. 29 U.S.C. § 1055(c)(1)(A)(i), (7)(B); *Hopkins v. AT&T Global Info. Solutions Co.,* 105 F.3d 153, 156-57 (4th Cir. 1997).[15]

This issue pits Virginia law against ERISA's guidelines. Under Virginia law, rights vest at the entry of the final divorce decree; while under ERISA, rights vest at the plan participant's retirement or death. *Compare Himes v. Himes,* 12 Va. App. 966, 970, 407 S.E.2d 694, 697 (1991) (holding that it is well established that "property rights and interests [become] vested in the parties when they [agree] upon them, set them forth in a valid separation agreement, and [have] them incorporated into their final divorce decree"), *with* 29 U.S.C. § 1055(c)(1)(A)(i), (7)(B) (requiring that a plan participant can only change beneficiary designations via spousal consent during the period between when the participant attains age 35 and when the participant dies); *Hopkins,* 105 F.3d at 156-57 (interpreting § 1055 and concluding that the limited time period to change beneficiaries under ERISA permanently set the vesting date at either the retirement or death of the plan participant), *and* 29

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[15] *Hopkins* was followed in an unreported Virginia circuit court decision, holding that the surviving spouse's rights vested at the plan participant's death and that these rights could not be divested by the competing claim of an ex-wife's through a prior DRO. *Riley v. Riley,* No. 132690, 1998 WL 972328, at *3-5 (Va. Cir. Ct. Aug. 14, 1998).

U.S.C. § 1056(d)(1) and (d)(3) (prohibiting alienation of benefits except through a QDRO). Notably, appellant recognizes this fundamental dichotomy between Virginia law and ERISA by stating that "the facts in the present case and the plan's requirement to pay benefits upon the participant's death to the surviving spouse create a clear contest between the rights created in the state court versus the rights granted under the [P]lan." Indeed, appellant's argument hinges on the conclusion that "[b]ecause the children's rights in the retirement plan vested well before Mrs. Cowser-Griffin had any arguable claim to the plan, this case should be decided in favor of the children." In my view, no convincing argument has been provided as to why this Court should apply Virginia's vesting rule when faced with ERISA's contrary vesting rule and its preemption mandate requiring invalidation of any conflicting state law. 29 U.S.C. § 1144(a). Importantly, the Supreme Court of Virginia has recognized that "ERISA preempts enforcement of any state law or contractual provision that 'relates to' an ERISA employee benefit plan and conflicts with an ERISA provision." *Brown v. Brown by Beacham,* 244 Va. 319, 325, 422 S.E.2d 375, 379 (1992) (finding that ERISA allowed a notarized signature to constitute spousal consent).

In *Boggs,* the United States Supreme Court recognized that ERISA may at times conflict with jurisprudence typically reserved to the states, but nevertheless, insofar as such state law conflicts with ERISA, the federal law prevails. *Boggs,* 520 U.S. at 841, 117 S. Ct. at 1760-61 ("We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. We hold that there is a conflict, which suffices to resolve the case."). Although the United States Supreme Court recognized the historic "central" role of state courts in regulating domestic relations matters, *id.* at 840, 117 S. Ct. at 1760, the Court by no means granted state courts exclusivity, but rather, invalidated the state court's law simply on the basis of its conflict with ERISA, *id.* at 841, 117 S. Ct. at 1760-61. ERISA attempts to promote the efficient distribution of benefits and protect the interests and rights of participants and beneficiaries. *Cf. Boggs,* 520 U.S. at 844-46, 117 S. Ct. at 1762-63. If ERISA could not preempt state law, then "states [would be] free to change ERISA's structure and balance," and the goals of ERISA would be thwarted. *Id.*

Neither federal nor state law supports the entry of a posthumous QDRO to divest a surviving spouse's vested rights to benefits.[16] Rather, the direct opposite assertion—that a surviving spouse's vested rights may not be divested by a posthumous QDRO—finds support in both federal and state law.

The Fourth Circuit considered the question of vesting in *Hopkins,* holding that a surviving spouse's rights vested at the plan participant's retirement and could not be divested by a post-retirement QDRO. 105 F.3d at 157. In the only reported Virginia case to

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[16] Although 29 C.F.R. 2530.206(c)(2) provides examples for when a posthumous QDRO may be entered after the plan participant's death, none of the examples involve a competing vested claim to the benefits. Indeed, the examples include no situation in which there is a competing claim to the benefits. Accordingly, these examples do not address the crucial threshold question in this case of vesting and provide no basis for allowing alienation of a benefit vested in the surviving spouse.

deal with this issue, a Virginia circuit court applied *Hopkins* ' rationale, held that a surviving spouse's rights vested at the plan participant's death, and refused to divest the surviving spouse's vested rights in favor of an ex-wife's alleged rights under a DRO. *Riley v. Riley,* No. 132690, 1998 WL 972328, at *3-5 (Va. Cir. Ct. Aug. 14, 1998). Other federal circuits and state courts have followed this same line of analysis, refusing to divest the vested rights of a surviving spouse when faced with a post-retirement or posthumous QDRO and the plan had no notice of the proposed QDRO before the participant's death or retirement. *E.g., Carmona v. Carmona,* 544 F.3d 988, 993 (9th Cir. 2008) ("[A] state DRO may not create an enforceable interest in surviving spouse benefits to an alternate payee after a participant's retirement, because ordinarily at retirement the surviving spouse's interest irrevocably vests."); *Rivers v. Cent. & S.W. Corp.,* 186 F.3d 681, 683-84 (5th Cir. 1999) ("[T]he benefits irrevocably vested in the second wife on the date of her husband's retirement, and plaintiff's failure to obtain a qualified domestic relations order ... prior to her ex-husband's retirement forever barred her from acquiring any interest in the plan."); *Langston v. Wilson McShane Corp.,* 828 N.W.2d 109, 116 (Minn. 2013) ("We find the reasoning of the *Carmona* and *Hopkins* courts to be persuasive and adopt the rule that surviving spouse benefits generally vest under ERISA at the time of the plan participant's retirement.").[17]

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[17] *See also Singleton v. Singleton,* 290 F.Supp.2d 767, 772 (W.D.Ky.2003) (refusing to divest a current spouse's rights when the plan participant retired because "[t]he requirements for

Here, appellant waited fourteen years to seek a QDRO and at no point did she provide the Plan Administrator with any notice of a competing claim to the benefits.[18] Under ERISA, Cowser-Griffin's rights to the Plan benefits vested at Griffin's death. Accordingly, the vested rights of Cowser-Griffin cannot be divested through a posthumous QDRO.

Similarly, the vesting issue cannot be dodged by finding that the Griffin DRO was a QDRO and entering it *nunc pro tunc* to an earlier date before Griffin's death.[19] The majority has correctly observed

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disenfranchising a current spouse are strictly applied for good and valid reasons"); *Stahl v. Exxon Corp.,* 212 F.Supp.2d 657, 669-70 (S.D.Tex.2002) (citing the majority of circuits that a surviving spouse's rights vest upon the plan participant's death and refusing to divest the surviving spouse's rights through a posthumous QDRO).

[18] The Dominion Plan Administrator has already rejected the proposed Griffin QDRO on the grounds that it would "requir[e] payment of a portion of the surviving spouse's survivor benefits to another person," thus violating the substantive requirements of a QDRO which provide that the QDRO cannot pay benefits not otherwise available under the Plan. Indeed, if the trial court were to enter the proposed Griffin QDRO, the parties would be faced with the Plan Administrator's standing decision to reject the proposed Griffin QDRO and would need to seek review the Plan Administrator's decision for error.

[19] The trial court could not enter the proposed Griffin QDRO *nunc pro tunc* (as opposed to the Griffin DRO) because this action would implicate the threshold question of vesting discussed *supra.* As appellee correctly points out, the exclusion of the posthumous QDRO is not simply a matter of timing, but is contingent on the issue of vesting. Accordingly, appellant's only remaining remedy would be for this Court to determine the Griffin DRO to be a QDRO.

I respectfully disagree with the majority's suggestion that we need to determine whether the proposed QDRO meets the statuthat the DRO lacked the requisite specificity to be deemed a QDRO. This Court cannot consider the Griffin DRO to be a QDRO because the Griffin DRO fails the specificity requirements of a QDRO because it does not list the percentage distribution of benefits between the children, the number of payments, or each plan to which it applies. 29 U.S.C. § 1056(d)(3)(C). Strict compliance with the substantive and specificity requirements is required in order for a DRO to qualify as a QDRO, regardless of whether these deviations may result in inequitable results. *Hawkins v. C.I.R.,* 86 F.3d 982, 992 (10th Cir. 1996) (holding that "to accept anything less than what [the specificity requirements mandate] would contravene the Supreme Court's frequent admonition that courts must not read language out of a statute").

A DRO may be qualified only when it clearly specifies the plans to which it applies and the amounts and timing of the payments to be received by each beneficiary. *See Metro. Life Ins. Co. v. Bigelow,* 283 F.3d 436 (2d Cir. 2002) (finding that a DRO could be qualified when it clearly specified each plan to which it applied by identifying the plan as the "General Electric insurance plan which consists of group life insurance, disability death and insurance"); *Stewart v. Thorpe Holding Co. Profit Sharing Plan,* 207 F.3d 1143, 1152 (9th Cir. 2000) (finding that a DRO could be qualified when it specified that the beneficiary was "to receive 'one-half of the community interest'" in the plan); *Metro. Life Ins. Co. v. Marsh,*

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tory requirements. The issue is whether the existing terms of the DRO satisfied the statutory requirement for a QDRO to defeat the vested surviving spouse's claim to the benefits.

119 F.3d 415, 422 (6th Cir. 1997) (finding that DRO could be qualified because it stipulated the percentage distribution to the beneficiaries as two-thirds of the plan). Courts require that the specificity requirements be met with particularity. *See Hamilton v. Wash. State Plumbing & Pipefitting Indus. Pension Plan,* 433 F.3d 1091, 1096-97 (9th Cir. 2006) (finding that a DRO failed the specificity requirements for a QDRO because it "does not require any action by the Plans, does not assign death benefits to the Children, and does not specify when the payments begin or the amount, calculation, or form of the payments");[20] *Bd. of Trs. of Plumbers & Pipefitters Nat'l Pension Fund v. Saxon,* 470 F.Supp.2d 605, 609 n. 5 (E.D. Va.) (finding that a DRO requiring a husband to "keep the Wife listed as a beneficiary on the plan" was "extremely vague" and could not be considered a QDRO), *aff'd in part, vacated in part,* 251 Fed. Appx. 155 (4th Cir. 2007).

The Griffin DRO fails the specificity requirements because it does not list the amount to be paid to the beneficiaries, the number of payments or durational period, nor the specific plans to which it applies. Rather, the Griffin DRO is an amorphous requirement that the parties agree to "name the children of

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[20] The Ninth Circuit additionally held that besides specificity, in order for a QDRO to divest a surviving spouse of her rights, the proposed QDRO had to assign rights to a former spouse, rather than to children. *Id.* at 1104. This specific approach has not been adopted in the Fourth Circuit nor in Virginia courts, and is an unnecessary complication of the specificity requirements and interpretation of § 1056(d)(3)(C)(i)-(iv). This Court need not reach this rationale because the Griffin DRO is not valid as a QDRO because it fails the specificity requirements.

the marriage as co-beneficiaries under all 401K plans and other such plans which would be distributed upon the death of either party." The lack of specificity is fatal to the Griffin DRO. This Court cannot relax the specificity requirements because to do so would defy Congress's clear requirement that a DRO becomes qualified "*only if* such order clearly specifies" certain requirements. 29 U.S.C. § 1056(d)(3)(C). Indeed, the specificity requirements were enacted to protect the Plan Administrator's ability to efficiently distribute plan benefits. *Hawkins,* 86 F.3d at 992-93. The Griffin DRO provides no such ease of distribution because it fails to include the amount payable to each child, when the money is to be paid, nor even the specific plans it applies to.

In this case state law conflicts with the provisions of ERISA. The federal protection afforded to the surviving spouse should prevail because neither a QDRO nor spousal consent have been established.

For the foregoing reasons, I respectfully dissent.

VIRGINIA
IN THE CIRCUIT COURT OF SUSSEX COUNTY

DAVID L. GRIFFIN	Plaintiff
v.	Case No.: CH98000034
SANDRA D. T. GRIFFIN,	Defendant

MEMORANDUM OPINION

The issue before this Court is whether to enter Ms. Sandra D. T. Griffin's Qualified Domestic Relations Order in the 1998 Sussex County action styled *David L. Griffin v. Sandra D.*

FACTS

Sandra Griffin and David Griffin were previously married, but divorced in Sussex County on August 12, 1998. The terms of the Final Decree of Divorce incorporated the Separation and Property Settlement Agreement entered into by the parties dated August 30, 1996. There were two children born of the marriage, namely James J. Griffin III on October 25, 1987 and Gloria D. Griffin, born July 6, 1992. Pursuant to the terms of the Separation and Property Settlement Agreement, husband and wife both agreed that for so long as any child was under the age of twenty-one years old, they would "designate the children as primary beneficiaries on a life insurance policy or policies on their respective lives in a face amount not less than $500,000.00 and to maintain, and continue in force all such life insurance policies." Under the terms of the same Agreement, the parties further agreed to "name the children of the marriage as co-beneficiaries under all 401(k) plans and other such plans which would be distributed upon the death of either party."

David Griffin passed away on May 26, 2012. At the time of his death, Gloria Griffin was nineteen years of age. Thus, he was under the obligation to name his two children as co-beneficiaries of his 401(k) and other such plans, as well as to maintain a life insurance policy with Gloria Griffin as primary beneficiary in a face amount not less than $500,000.00. When David Griffin passed away, he was insured through a life insurance policy administered through his employee benefit plan, a 401(k) type of plan known as the Dominion Salaried Savings Plan, and a pension fund known as the Dominion Pension Plan. Gloria Griffin was not designated as primary beneficiary of David Griffin's life insurance policy, nor were James Griffin and Gloria Griffin designated as co-beneficiaries under 401(k) type plans. The life insurance funds have already been distributed and are not subject to a Qualified Domestic Relations Order ("QDRO"). Ms. Sandra Griffin has not submitted a QDRO with respect to the Dominion Pension Plan that maintained a Special Retirement Account with approximately $20,000.00 in it at the date of Mr. Griffin's death. The Dominion Salaried Savings Plan operated like a 401(k) plan and the amount of funds totals to about $350,000.00. Sandra Griffin now seeks to enter a QDRO to enforce the Final Decree of Divorce with respect to the Dominion Salaried Savings Plan. Neither the PSA nor the final decree qualifies as a QDRO.

DISCUSSION

"[Jurisdiction in divorce suits is purely statutory." *Sprouse v. Griffin*, 250 Va. 46, 50, 458 S.E.2d 770, 772 (1995). Defendant Sandra Griffin claims that since "death terminates the marriage," any related divorce proceeding is rendered "moot" and the court is divested of jurisdiction. However, the language from case law states in full that a "divorce suit abates when one party dies while the suit is pending and before a decree on the merits; this is because the death terminates the marriage, thus rendering the divorce suit moot as it relates to the parties' marital status." *Id.* Thus, the suit is not rendered moot for any related divorce proceedings, just as it relates to whether the parties are still married.

In Virginia, property settlement agreements may be incorporated into a court's divorce decree "in the same manner as any provision of such decree." Va. Code Ann. § 20-109.1 (2013). Virginia Code § 20-121.1 states that the Court may reinstate a suit upon the docket "for such purposes as may be necessary to grant full relief to all parties." Va. Code Ann. § 20-121.1 (2013). Further, § 20-107.3(K) of the Virginia Code grants the Court continuing authority and jurisdiction "to make any additional orders necessary to effectuate and enforce any order entered pursuant to [equitable distribution]." Va. Code Ann. § 20-107.3(K) (2013). Moreover, the Code expressly grants the Court the power to

> Modify any order entered in a case filed on or after July 1, 1982, intended to affect or divide any pension, profit-sharing or deferred compensation plan or retirement benefits pursuant

> to the United States Internal Revenue Code or other applicable federal laws only for the purpose of establishing or maintaining the order as a qualified domestic relations order or to revise or conform its terms so as to effectuate the expressed intent of the order.

Va. Code Ann. § 20-107.3(K)(4) (2013). Defendant asserts that § 20-107.3(K) does not create jurisdiction to allow a court to modify a decree after one of the parties has died. While this is true, the Court would not be modifying the final decree's incorporation of the property settlement agreement, but rather would effectuate and enforce such an order by entry of a QDRO. Thus, this Court has jurisdiction over the matter.

However, even though this Court has jurisdiction, Defendant's Motion for Entry of the Qualified Domestic Relations Order is denied. The Employee Retirement Income Security Act ("ERISA") prohibits the assignment or alienation of benefits provided under a pension plan. 29 U.S.C. § 1056(d) (2013). In 1984, Congress amended ERISA in the Retirement Equity Act ("REA") to provide for state-court-ordered assignments of plan benefits to former spouses and dependents. *Trs. of the Dirs. Guild of America-Producer Pension Benefits Plans v. Tise*, 234 F.3d 415, 419 (9th Cir. 2000). The REA prescribed an exception to ERISA's general prohibition against the assignment of pension plan proceeds by allowing for individuals to present a QDRO to plan administrators. *Id.*; see 29 U.S.C. § 1056(d)(3) (2013).

Mr. Griffin's Dominion Salaried Savings Plan is a pension plan governed by ERISA. Under ERISA, a "pension plan" is defined as

> any plan, fund, or program which has heretofore or is hereafter established or maintained by an employer . . . that by its express terms or as a result of surrounding circumstances such plan, fund or program-
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions of the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. § 1002(A) (2013). All pension plan benefits are payable to the surviving spouse upon the death of the plan participant, absent written consent of that spouse to a different election by the participant. See 29 U.S.C. § 1055(b)(1) & (c)(2) (2013); *Boggs v. Boggs*, 520 U.S. 833, 843 (1997). Defendant argues that the children are not seeking the surviving spouse annuity, but §1055 covers most pension plans, with a few exceptions. While some individual account plans escape § 1055's surviving spouse annuity requirements under certain conditions, Congress still protects the interests of the surviving spouse by requiring those plans to pay the spouse the nonforfeitable accrued benefits in a lump-sum payment. *Boggs*, 520 U.S. at 843; 29 U.S.C. § 1055(b)(1)(C). Therefore,

even the excepted plans must specifically require the participant's benefits to be paid to the surviving spouse, absent written consent to an alternate payee. 29 U.S.C. § 1055(c)(2)(A)(i)-(B). Dominion's Salaried Savings Plan documents provide the specific method by which a plan administrator is to pay out benefits, pursuant to Code § 1055,

> Federal law requires that, if you are married when you die, your spouse must receive the distribution unless she or he approved your choice of another (or an additional) beneficiary before your death. Your spouse must agree to your choice of that beneficiary by signing the spousal consent portion of a Beneficiary Authorization From obtained from ACS. The form must have been completed, signed, notarized and returned to ACS before your death.

The purpose behind § 1055 is to ensure a stream of income to surviving spouses. The Retirement Equity Act modified ERISA to permit plan participants to designate a beneficiary for survivor benefits, other than the nonparticipant spouse, only when the spouse agrees. 29 U.S.C. § 1055(c)(2). However, a QDRO "elevates a plan participant's legal obligations, commonly to a former spouse or children of a previous marriage, over the participant's express wishes to provide for other individuals as designated beneficiaries." *Tise*, 234 F.3d at 425. The QDRO is a subset of a domestic relations order (DRO) that recognizes the right of an alternate payee to "receive all or a portion of the benefits payable with respect to a participant under the plan." 29 U.S.C. § 1056(d)(3)(B)(i)(I) (2013). If a DRO qualifies as a QDRO, the alternate payee is considered a "beneficiary under the plan." 29 U.S.C. § 1056(d)(3)(J)-(K) (2013).

In *Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153 (4th Cir. 1997), the Court of Appeals for the Fourth Circuit found that the entry of a QDRO pertaining to surviving spouse pension benefits was not proper. In *Hopkins*, an ex-wife sought the entry of a QDRO to collect past-due alimony and current alimony from her ex-husband's ERISA-governed pension. *Id.* at 155. AT&T conceded that the Pension Order was a QDRO, but argued that the Surviving Spouse Benefits had already vested in the ex-husband's current spouse when he retired. *Id.* at 155-56. Under ERISA, the current spouse was a "beneficiary" and not a "participant." *Id.* at 156. To qualify as a domestic relations order, the order must relate to a benefit "payable with respect to a participant." *Id.*; 29 U.S.C. § 1056(d)(3)(B)(i)(I) (2013). The Fourth Circuit found that because the Surviving Spouse benefits vested in the participant's current spouse on the date the participant retired, and because the current spouse was a beneficiary and not a participant, the Surviving Spouse Order did not relate to a benefit "payable with respect to a participant." *Hopkins*, 105 F.3d at 157.

"Posthumous" QDROs may be enforceable, as ERISA does not require that a QDRO be prepared or submitted at any particular time. *Nat'l City Corp. Non-Contributory Retirement Plan v. Ferrell*, No. 1:03CV259, 2005 U.S. Dist. LEXIS 36149, at *12 (N.D. W. Va. Aug. 31, 2005). Additionally, ERISA does not suggest that an alternate payee does not have any interest in the plan benefits until a QDRO has been obtained; ERISA merely prevents the alternate payee from enforcing the interest until the QDRO has been obtained. Id., at *13. In *Ferrell*, the ex-wife was awarded one hundred percent of the ex-husband's benefits under the Plan and prior to the entry of a QDRO, the ex-husband died without designating a Death Beneficiary, thus his children would have received his benefits by default. *Id.*, at *6-9. The *Ferrell* court held that a "QDRO that grants an alternate payee an interest in a participant's pension benefits on a date prior to that participant's death is posthumously enforceable under ERISA." *Id.*, at *18. However, it is important to note that although the QDRO was ultimately entered subsequent to the plan participant's death, the plan administrator approved the language in the ex-spouse's proposed QDRO prior to learning of the participant's death, although the death had already occurred. *Id.*, at *9. The plan participant was also unmarried at the time of his death. It is further instructive that

> [d]uring the interval between July 25, 2003, the date [the plan participant] died and the present, the Plan made no payments to the [plan participant]'s children. In point of fact, the Plan had not even determined the identity of the Death Beneficiaries before it approved [the ex-wife]'s QDRO on August 15, 2003. Thus, even had [the plan participant]' s children been able to receive plan proceeds on July 25, 2003, they cannot receive such benefits now. Similarly, had the Plan previously made payments to [the plan participant]'s children, [the ex-wife]'s right to those payments would be unenforceable even though she had a legally enforceable interest in them prior to [the plan

> participant]'s death. Accordingly, [the ex-wife] is now entitled to receive one hundred percent of the assets in [the plan participant]'s pension fund.

Id., at *23 n. 5.

The Court of Appeals for the Ninth Circuit also found a posthumous QDRO proper to enforce an order awarding past due child support. *Tise*, 234 F.3d at 426. In *Tise*, prior to the plan participant's death, the mother of the plan participant's children secured a writ of execution against the retirement plan for child support arrearages. *Id.* at 425. This writ enforced the mother's right to child support payments as established by court order and was found to be a domestic relations order. *Id.* Prior to the plan participant's death, the mother only had to obtain a QDRO to enforce the interest obtained by the state court order and the plan should have determined whether the order qualified as a QDRO. *Id.* The plan participant had not remarried, but named his live-in girlfriend as his plan beneficiary. *Id.*, at 417. The Ninth Circuit ruled that the distribution of death benefits to Tise was proper even though the QDRO had not been obtained prior to the plan participant's death, because the mother had put the plan on notice of her interest in the plan participant's pension plan proceeds before his death. *Id.* at 426. The *Tise* court specifically noted that it did "not decide whether a QDRO could issue after a participant's death if the plan had no notice of a DRO-created interest before the death." *Id.* at 426 n. 9. Additionally, it is of important note that the plan participant had not remarried, so the court did not rule on the issue of whether surviving spouse benefits had already vested in a current spouse.

Therefore, under controlling federal law, without a preexisting QDRO, Mr. Griffin's retirement benefits in the Dominion Salaried Savings Plan vested entirely in the designated beneficiary and surviving spouse, Ms. Kimberly Cowser-Griffin, once the plan participant passed away. The federal cases that have considered the question of "vesting" of benefits in the plan participant's spouse at the time of retirement or preretirement death have concluded either that the former spouse must have perfected a QDRO at the time the benefits became payable, or that in order to effect a postmortem qualification of the domestic relations order ("DRO") as a QDRO, there must have been a DRO awarding the interest in the pension plan and substantially complying with ERISA's QDRO specificity requirements at the time the benefits became payable. Alternatively, Ms. Sandra Griffin could have put the plan on notice of her children's interest in the benefits. Ms. Griffin failed to perfect a QDRO prior to Mr. Griffin's passing, and the final decree of divorce and the PSA do not qualify as a QDRO. Further, there is no evidence in the record that any notice of the children's potential claim under the PSA was ever provided to the Plan at any time before the plan participant's death. Thus, Defendant's Motion for Entry of the Qualified Domestic Relations Order is denied.

CONCLUSION

Accordingly, for the reasons herein, Defendant's Motion for Entry of the Qualified Domestic Relations Order is denied. Counsel for Mr. Griffin will please prepare an order reflecting this decision of the Court. The Court thanks both counsel for their able representation of their respective interests.

Enter this 14th day of March, 2013.

/s/________________________

Excerpts from Dominion Salaried Savings Plan

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ELIGIBILITY

Participation in the Savings Plan is voluntary. You are eligible to participate in the Savings Plan on the date your employment begins if the following conditions are met:

- You are employed by Dominion as a regular full-time or part-time employee; and
- You are at least 18 years old; and
- You are scheduled to work or actually work at least 1,000 hours in a twelve (12) month period.

You may not participate in the Savings Plan if:

- You are an independent contractor.
- You are a contractor hired through an agency.
- You are a "leased employee."
- You are a member of a collective bargaining unit that has not accepted the terms of the Savings Plan.
- You are a non-resident alien.
- You are employed by Dominion on a limited-term basis or with respect to specific tasks or projects.

<u>ENROLLMENT.</u>

Once you meet the eligibility requirements, you may enroll in the Savings Plan by calling the toll-free number for ACS HR Solutions ("ACS"), which is 1-877-706-SAVE (1-877-706-7283). You can also enroll online at <u>https://www.benefitsweb.com/dominion.html</u>. Enrollment is effective as soon as administratively feasible following the date on which you make your election to enroll, depending on when you call and the payroll change cut-off dates.

ENROLLMENT KIT

You will receive a Savings Plan Enrollment Kit from ACS, usually within 30 days of your employment. The kit will be mailed to your address of record. Your kit will include information to assist you in making the important decisions necessary to participate in the Savings Plan.

You will have to decide:

- What percentage of Compensation you want to save. "Compensation" means your actual base pay received, excluding commissions, overtime, bonuses, fees, allowances, and other special payments. Compensation does include merit lump sum payments. However, it does not include the special 2010 Merit Lump Sum payment made to employees in October 2010. A "merit lump sum payment" is any monetary award, or portion of a monetary award, for individual performance paid as a lump sum in lieu of a base salary increase as part of Dominion's merit pay program.

- Whether you will save on a pre-tax basis, after-tax basis, or both.

  Note: Pre-tax contributions you make to the Savings Plan will not reduce your Compensation for the purpose of calculating other benefits, such as retirement, life insurance, and Social Security contributions. Pre-tax deductions for health care benefits also will not reduce your Compensation for the purpose of calculating your contributions to the Savings Plan.
- The specific funds where you will invest your contributions.
- Whether you wish to participate in the Stock Dividend Reinvestment Program (if you are investing in the Dominion Stock Fund).

You may enroll through the toll-free number for ACS at 1-877-706-SAVE (or 1-877-706-7283), or through the Savings Planes Internet site at https://www.benefitsweb.com/dominion.html. Customer service representatives are available from 9:00 a.m. to 8:00 p.m., Eastern time, Monday through Friday, to assist with your enrollment and any other questions or transactions related to the Savings Plan.

AUTOMATIC ENROLLMENT

If you are hired on or after January 1, 2008 (or rehired on or after that date following a five-year break in service), once you meet the eligibility requirements, and unless you specifically elect otherwise, you will automatically be enrolled in the

Savings Plan for a contribution equal to 4% of your Compensation. Your enrollment will become effective approximately 45 days after your initial hire date (or the first date you otherwise meet the Savings Plan eligibility requirements).

At any time before or after your automatic enrollment period, you may elect to enroll in the Savings Plan at a contribution rate higher or lower than 4%, or you may opt out of participating in the Savings Plan, by calling the toll-free number for ACS or logging on to httbs://www.benefitsweb.com/dominion.html. Enrollment elections made in this manner are effective as soon as administratively feasible following the date on which you make your election, depending on when you call or log in and the payroll change cut-off dates.

PIN

To ensure that your personal information is kept safe and all transactions are made in a secure environment, you are required to enter your Social Security number and a Personal Identification Number (PIN) when you call the ACS toll-free number. You are also required to enter a User ID (which is initially your Social Security number) and Passcode when accessing the Web site, A letter that contains your initial PIN and Passcode will be sent to your address on file, under separate cover. If you have not received this information prior to when you are ready to enroll or change the default elections, or if you have questions about your automatic enrollment, please call the ACS toll-free number for assistance.

BENEFICIARY

You may make or change your beneficiary designation online through the Internet site or through an ACS customer service representative.

- If you are married and name someone other than your spouse as your beneficiary, your spouse must agree to your choice of that beneficiary by signing the spousal consent portion of a Beneficiary Authorization Form in the presence of a notary public. You may print a copy of this form from the Internet site or an ACS customer service representative will mail the form to you. After the completed form is received and reviewed by ACS, you will receive a confirmation of your elections in the mail.
- Effective January 1, 2012, if, at the time of your death, you are not married and have not designated a Beneficiary, your Beneficiary will be your estate.
- If, at the time of your death (if on or before December 31, 2011), you are not married and have not designated a Beneficiary, your Beneficiary will be:
    - Your children. If one or more of the children are deceased, that child's children (participant's grandchildren) will receive the deceased child's share.
    - If no children or grandchildren survive you, your parents will be your Beneficiary. Any distribution will be divided evenly among the eligible Beneficiaries.
    - If your parents are deceased, the balance of

your Account will be paid to your estate.

RE-EMPLOYMENT

If you are re-employed with Dominion, you can re-enroll in the Savings Plan under two alternatives:

- If you are re-employed and were a participant under the Savings Plan (or any predecessor plan) prior to your initial termination from service, you may re-enroll immediately. You should contact the Dominion HelpLine to obtain authorization for ACS to immediately forward an enrollment kit to you.
- If you are re-employed but were never a participant under the Savings Plan (or any predecessor plan) prior to your initial termination from service, you may enroll upon satisfying the eligibility requirements for the Savings Plan.

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DEATH BENEFITS

Your Beneficiary

If you die while employed by Dominion, the entire value of your account is distributed to your beneficiary, including the value of all Company Matching contributions that automatically become vested upon your death.

Federal law requires that, *if you are married when you die*, your spouse must receive the distribution unless she or he approved your choice of another (or an additional) beneficiary before your death. Your spouse must agree to your choice of that beneficiary by signing the spousal consent portion of a Beneficiary Authorization Form obtained from ACS. The form must have been completed, signed, notarized, and returned to ACS before your death.

If you are not married when you die, your beneficiaries will receive the value of your Savings Plan account. If you have not named a beneficiary, the value of your Savings Plan account will be paid according to the method outlined in the "Beneficiary" subsection of the "Enrollment" section.

Time and Form of Payment

Your spouse, beneficiary, or executor has 60 days after being notified by the Plan Administrator to make an election regarding the timing of the distribution and the form of payment. If an election is not made within 60 days and the vested value of the account is $1,000 or less, an immediate lump sum cash payment will be made and taxes will be withheld.

Your beneficiary has the following options with respect to the timing of the death benefit payment if the value of the account exceeds $1,000:

- An immediate lump sum distribution. If elected, the lump sum payment will be made after the election is received by ACS and processed under the same procedures as any other Savings Plan distribution.
- If your surviving spouse is your sole Beneficiary and you were receiving installment payments immediately prior to your death, your surviving spouse may elect to continue the installment payments, or; has the option to

delay the remainder of the installment payments until the April 1 of the calendar year following the year in which you would have reached age 70½.

- If you are not married or your surviving spouse is not your sole Beneficiary, your Beneficiary may elect annual payments of the balance of your Account that conclude by the December 31 of the calendar year containing the fifth (5th) anniversary of your death.

*   *   *   *   *

YOUR EXCLUSIVE BENEFIT

The benefits provided by Dominion's plans are intended for the exclusive use of you and your dependents, beneficiaries, and survivors. These benefits may not be assigned, sold, transferred, or pledged by you, or attached or seized by creditors except as permitted by law. For instance, if you are divorced, benefit payments from the Pension Plan or Savings Plan may be made to your former spouse, your child, or other dependent only in response to a Qualified Domestic Relations Order (QDRO).

October 29, 2012

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Re: Proposed Domestic Relations Order, David L. Griffin

Dear Mr. Griffin and Mr. Old:

This letter provides a further update regarding the proposed domestic relations order concerning the benefit of David L. Griffin under the Dominion Salaried Savings Plan (the "Proposed DRO").

The parties' attention is directed to the recently decided case of *Board of Trustees of the Indiana State Council of Plasters & Cement Masons Pension Fund v. Steffens et al.*, E.D. Mo., No. 4:12-CV-513 (Oct. 22, 2012). For your reference, I have enclosed a copy of the decision.

The *Steffens* case concerns a domestic relations order entered after the participant's death. That order allocated a portion of the participant's defined contribution retirement account to his former spouse. However, the participant had remarried, and his spouse at the time of his death was his surviving spouse under the plan.

The plan administrator in the *Steffens* case determined that the domestic relations order was not qualified, relying on the Department of Labor's 2010 regulations to conclude that the order impermissibly required payment to the former spouse of an amount that was effectively vested in the current spouse. *Id.* at 5-6. The court upheld the plan administrator's determination that the order was not qualified because, by requiring payment of a portion of the surviving spouse's survivor benefits to another person, the order mandated payment of a benefit that was not otherwise available under the plan. *Id.* at 8 (collecting cases).

The Plan Administrator of the Dominion Salaried Savings Plan has concluded that the reasoning of *Steffens* is applicable to the Proposed DRO. Therefore, the Plan Administrator must inform you that the Proposed DRO will not be treated as a qualified domestic relations order. However, in light of the parties' competing claims and continued litigation, the administrative hold on Mr. Griffin's account remains in place.

Regards,

Marlene K. Zeigler
Sr. Human Resource Specialist
Enclosure