No. 14-1531

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

SUPPLEMENTAL BRIEF FOR PETITIONER

W. HUNTER OLD
HEATH, OVERBEY, VERSER & OLD, PLC
11832 Rock Landing Dr., Suite 201
Newport News, VA 23118
(757) 559-0734

JOHN P. ELWOOD
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500

TOBY J. HEYTENS
Counsel of Record
DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127
heytens@virginia.edu

[Additional Counsel Listed on Inside Cover]

DAVID T. GOLDBERG
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

CHRISTOPHER T. PAGE
KAUFMAN & CANOLES, P.C.
4801 Courthouse Street, Suite 300
Williamsburg, VA 23188
(757) 259-3800

SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to this Court's Rule 15.8, petitioner submits this supplemental brief to address developments that have occurred since the filing of the petition for a writ of certiorari.

The petition for a writ of certiorari makes three fundamental points. *First*, the federal courts of appeals and state courts of last resort are divided—and the Supreme Court of Virginia and the relevant regional court of appeals for that state are divided—over the precise question at issue in this case: whether ERISA permits a court to retroactively reassign plan benefits after the plan participant's death when the participant directed that those benefits would go to his spouse. See Pet. 10-20. *Second*, the Supreme Court of Virginia's decision—a decision rendered by a one-vote margin—is wrong because it contravenes the plain terms of the ERISA plan at issue in this case, thus violating this Court's repeated admonition that the text of the plan documents is controlling. See Pet. 20-23. *Third*, the Supreme Court of Virginia's decision puts plan administrators in an untenable position, both by making it far more difficult to determine who is entitled to benefits and by raising the very real prospect of inconsistent determinations on that question. See Pet. 23-26.

On July 9, 2015, after the filing of the petition in this case, the administrator of the Dominion Salaried Savings Plan at issue in this case ("Dominion Plan" or "Plan") sent a letter to petitioner, respondent, and their counsel, which underscores *each* of those contentions. See App., *infra*, 2a-15a. The letter stated

that the plan administrator had received an order entered by the state trial court in the wake of the decision of the Supreme Court of Virginia that purported to name the Griffin children as alternate payees to Mr. Griffin's benefits under the Dominion Plan. *Id.* at 3a.

The plan administrator stated that it "respect[ed] the decision of the Supreme Court of Virginia and ha[d] given it serious consideration." App., *infra*, 7a. The plan administrator noted, however, that "the Plan was not a party to that litigation and is not bound by that decision." *Ibid.* The plan administrator then explained that it had determined that the trial court's most recent decision "cannot qualify as a QDRO under the terms of the Plan because it seeks to assign to the Alternative Payees the right to receive benefits already payable to [petitioner]," *id.* at 14a, and that had already "effectively vested in [petitioner]," *id.* at 5a (internal quotation omitted).

The plan administrator gave a number of reasons for its decision. First, the plan administrator stated that it "must give controlling weight to the *Hopkins* decision of the Fourth Circuit, which is binding in Virginia." App., *infra*, 12a; see Pet. 12-13 (explaining that the Supreme Court of Virginia's decision conflicts with *Hopkins* v. *AT&T Global Info. Solutions Co.*, 105 F.3d 143 (4th Cir. 1997)). Second, the plan administrator also emphasized its duty to "follow the 'straightforward rule of hewing to the directives of the plan documents,'" and in this case, "[t]he [p]lan makes clear that where a Participant dies while in the employ of Dominion Resources, Inc., his vested Accounts 'shall be paid to his surviving

spouse.'" App., *infra*, 10a. Thus, the plan documents provided that "[u]pon [Mr.] Griffin's death, his interest in the Plan transferred to [petitioner]." *Id.* at 13a. The plan administrator thus concluded that the trial court's order "seeks to transfer benefits that, under the terms of the Plan, belong to [petitioner]." *Id.* at 13a.

Despite its conclusion that the trial court's order did not constitute a QDRO under the plan's plain terms, the plan administrator noted that "[a] split of authority exists on whether retirement benefits vest in the beneficiary at the plan participant's death and whether a DRO can divest those benefits from a beneficiary after the plan participant's death." App., *infra*, 10a. In addition, the plan administrator noted that "the law is not settled and that the parties continue to litigate their competing claims" via this petition for a writ of certiorari. App., *infra*, 14a Although the plan's "only interest in this matter is to determine the proper beneficiary or beneficiaries to David Griffin's account," the plan administrator explained that, under the current state of affairs, it "cannot distribute the Account Balance without the risk of being subjected to multiple competing claims by the parties and the costs, expenses, and multiple payments potentially resulting from such multiple claims or suits." *Ibid.* For that reason, the plan administrator stated that it had "initiated an interpleader complaint in the United States District

for the Eastern District of Virginia." *Id.* at 14a; see *id.* at 16a-30a (interpleader complaint).[1]

These developments underscore the need for this Court's review. As the plan administrator explained, the Supreme Court of Virginia's decision "disrupt[s] the orderly and predictable 'bright-line' administration of the Plan that ERISA, as interpreted by the U.S. Supreme Court, requires." App., *infra*, 11a. But, as the plan administrator recognized, its dilemma about whether to follow the decision of the Supreme Court of Virginia or the regional federal court of appeals cannot be resolved by a federal district court in an interpleader action: It can only be resolved by this Court via a petition for a writ of certiorari. *Id.* at 11a ("Ultimately, the Supreme Court of the United States will need to resolve this split of authority, perhaps in this very case."). What is more, plan administrators should not have to engage in ancillary litigation—thus imposing still more litigation expenses on parties seeking to resolve ownership of a limited pool of benefits—simply to clarify their legal obligations. And, finally, an interpleader action in federal district court in Virginia can do nothing to alleviate the conflicting obligations of scores of ERISA plan administrators whose multistate

[1] Undersigned counsel have not been retained to represent petitioner in connection with the interpleader action. Petitioner advises us that, as of the date of the filing of this brief, she has neither been served with process nor asked to waive service of process in that action. The most recent docket entry in the interpleader action is a July 13, 2015, letter from counsel for the plan administrator stating that it will attempt to obtain a waiver of service.

operations straddle circuits and States with conflicting rules.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

W. HUNTER OLD
HEATH, OVERBEY, VERSER & OLD PLC
11832 Rock Landing Dr., Suite 201
Newport News, VA 23118
(757) 559-0734

JOHN P. ELWOOD
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500

DAVID T. GOLDBERG
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

TOBY J. HEYTENS
Counsel of Record
DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127
heytens@virginia.edu

CHRISTOPHER T. PAGE
KAUFMAN & CANOLES, P.C.
4801 Courthouse Street, Suite 300
Williamsburg, VA 23188
(757) 259-3800

AUGUST 2015

APPENDIX CONTENTS

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Dominion Resources Services, Inc.
P.O. Box 26666, Richmond, VA 23261

July 9, 2015

Gloria D. Griffin
2704 Nestlebrook Trail
Virginia Beach, VA 23456

James J. Griffin, III
2704 Nestlebrook Trail
Virginia Beach, VA 23456

J. Roger Griffin, Jr. Esq.
Christie, Kantor, Griffin & Smith
477 Viking Drive, Suite 150
Virginia Beach, VA 23452

Kimberly Cowser-Griffin
4584 Rolfe Highway
Dendron, VA 23839

W. Hunter Old, Esq.
Heath, Overbey, Verser & Old, PLC
11832 Rock Landing Drive, Suite 201
Newport News, VA 23118

David L. Griffin, c/o Kimberly Cowser-Griffin, Executrix of the Estate of David L. Griffin, deceased v. Sandra D.T. Griffin (Case No. CL 98-34-01): Domestic Relations Order

Dear Ms. Griffin, Mr. Griffin, Mr. Griffin, Ms. Cowser-Griffin and Mr. Old:

By letter dated May 21, 2015,[1] the plan administrator received an order entered by the Circuit Court for the County of Sussex on May 18, 2015 in the above legal proceeding, naming Gloria D. Griffin and James J. Griffin, III as Alternate Payees to David Griffin's benefits in the Dominion Salaried Savings Plan (the "Plan"). On June 10, 2015, the plan administrator notified interested parties of its receipt of the domestic relations order ("the DRO") and the procedures that would be followed to determine whether it satisfies the Qualified Domestic Relations Order ("QDRO") requirements set forth in Section 414(p) of the Internal Revenue Code and the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

Having now considered the terms of the Plan, the decision of the Supreme Court of Virginia approving the order, advice of legal counsel, and divided legal authority as to whether benefits vest in the Beneficiary upon the death of the Participant, the plan administrator has determined that the DRO issued by the Circuit Court for the County of Sussex on May 18, 2015 does not satisfy the QDRO requirements of ERISA.

Dominion Receives Draft Domestic Relations Order after Death of Participant.

The May 18, 2015 DRO was issued after years of litigation in Virginia state courts between Sandra Griffin and Kimberly Cowser-Griffin, Executrix of

[1] This letter was mistakenly dated 2014.

the Estate of David L. Griffin. On May 26, 2012, Plan Participant David Griffin passed away. At the time of his death, his surviving spouse and second wife, Kimberly Cowser-Griffin ("Cowser-Griffin"), was David Griffin's beneficiary both by his designation and under Section 2.5(a) of the Plan. Although David Griffin's 1998 Separation and Property Settlement Agreement ("PSA") with his former spouse, Sandra Griffin, provided that his children from his first marriage[2] would be co-beneficiaries in the Plan, no DRO providing for this was presented to the Plan, and the Plan had no notice of the PSA, until the Plan received an October 5, 2012 letter from counsel for Sandra Griffin with a draft order for review.

Dominion notified Cowser-Griffin of the draft DRO, informing her that a hold had been placed on the account "until it is determined the order meets Dominion's requirements for a 'qualified' order." Dominion further explained that once it received a certified copy of the order entered by the court, it would notify her of "the final determination as to the qualified status of the order." In letters dated October 11 and 16, 2012, Dominion responded to Sandra Griffin's attorney, stating that the form of the proposed order appeared to meet the requirements of a QDRO with one minor edit.

Dominion Determines that Draft Domestic Relations Order Is Not a QDRO.

A few weeks later, in a letter dated October 29, 2012, Dominion notified both parties that the plan administrator had concluded "that the Proposed DRO

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[2] Gloria D. Griffin (Born July 6, 1992) and James J. Griffin, III (born October 25, 1987).

will not be treated as a qualified domestic relations order" because, based on legal authorities interpreting ERISA, "the order impermissibly required payment to the former spouse of an amount that was effectively vested in the current spouse." Recognizing the parties' competing claims, the Plan continued the administrative hold on the benefits, preventing any distributions from the account. Throughout the litigation, Dominion has continued the administrative hold on the account.

Circuit Court Rules that Deceased's Benefits Vested in Surviving Spouse.

On March 14, 2013, the Circuit Court denied Sandra Griffin's motion for a DRO appointing the children as alternate payees of the deceased's benefits, finding that "under controlling federal law" the deceased's retirement benefits had vested entirely in the surviving spouse, the beneficiary under the Plan, once David Griffin passed away:

> 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.

Griffin v. Griffin, Case No.: CH98000034 (Va. Cir. Ct. Mar. 14, 2013).

Court of Appeals Reverses and Rules that Benefits Did Not Vest in the Surviving Spouse.

The Circuit Court's decision was reversed by a 2-1 decision of the Court of Appeals of Virginia. *Griffin v.*

Griffin, 753 S.E.2d 574 (Va. Ct. App. 2014). The majority distinguished *Hopkins v. AT&T Global Information Solutions, Co.*, 105 F.3d 153 (4th Cir. 1997) (holding that the benefits in that case "vest in the participant's current spouse on the date the participant retires"). In the majority's view, *Hopkins* was not persuasive on the subject of vesting because it involved different benefits from those at issue in *Griffin*. The majority concluded that "benefits did not vest in Cowser-Griffin at Mr. Griffin's death" and directed the Circuit Court to enter the draft DRO:

> [T]he right of the children to 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.

Griffin, 753 S.E.2d at 588-89.

In dissent, Judge Huff observed that "[t]his issue pits Virginia law against ERISA 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." *Id*. at 592 (Huff, J., dissenting). In the view of the dissenting

judge, "a surviving spouse's vested rights may not be divested by a posthumous QDRO," citing, among other authorities, *Hopkins*, 105 F.3d at 156-57; *Carmona v. Carmona*, 544 F.3d 988 (9th Cir. 2008); and *Rivers v. Cent. & S. W. Corp.*, 186 F.3d 683 (5th Cir. 1999). *Griffin*, 753 S.E.2d at 593 (Huff, J., dissenting).

The Supreme Court of Virginia Affirms, and Cowser-Griffin Petitions for Certiorari.

In February 2015, the Supreme Court, in a 4-3 decision, affirmed the Court of Appeals "for the reasons stated in the majority opinion of the Court of appeals." Cowser-Griffin v. Griffin, 771 S.E.2d 660, 660 (Va. 2015). Dissenting justices reasoned that "the benefits at issue became vested in Mrs. Cowser-Griffin at the time of Mr. Griffin's death," a result "consistent with the majority of ERSIA [*sic*] case law." *Cowser-Griffin*, 771 S.E.2d at 662 (Millette, J., dissenting).

After obtaining an extension of the time for filing a petition for a writ of certiorari, David Griffin's Estate filed a petition for a writ of certiorari with the U.S. Supreme Court on June 24, 2015. Petition for a Writ of Certiorari, *Cowser-Griffin v. Griffin*, No. 14-1531, 2015 WL 3918905 (June 24, 2015).

Administrator's Duty to Determine Whether the DRO Is a Qualified Domestic Relations Order.

The plan administrator respects the decision of the Supreme Court of Virginia and has given it serious consideration, but the Plan was not a party to that litigation and is not bound by that decision. A plan administrator must administer an ERISA Plan "in accordance with the documents and instruments

governing them." 29 U.S.C. § 1104(a)(1)(D). The plan administrator previously advised the parties on October 29, 2012 that the draft DRO was not a QDRO because "the order impermissibly required payment to the former spouse of an amount that was effectively vested in the current spouse."

The Pertinent Plan Terms.

The Supreme Court of the United States has instructed:

> ERISA requires "[e]very employee benefit plan [to] be established and maintained pursuant to a written instrument," 29 U.S.C. § 1102(a)(1), "specify[ing] the basis on which payments are made to and from the plan," § 1102(b)(4). The plan administrator is obliged to act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I] and [Title IV] of [ERISA]," § 1104(a)(1)(D), and ERISA provides no exemption from this duty when it comes time to pay benefits.

Kennedy v. Plan Adm'r for DuPont Say. & Inv. Plan, 555 U.S. 285, 300 (2009). "[A] plan administrator who enforces a QDRO must be said to enforce plan documents, not ignore them." *Id.* at 301. The Alternate Payees' claim for benefits "therefore stands or falls by 'the terms of the plan,' § 1132(a)(1)(B), 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.'" *Id*. at 300 (quoting *Egelhoff v. Egelhoff,* 532 U.S. 141, 148 (2001)).

The Plan is a defined contribution plan designed to encourage eligible employees of Dominion Resources, Inc. to build financial security through long-term savings. The Plan defines the term "Beneficiary" as "the person or entity who is to receive any benefits payable from the Plan on account of a Participant's death." Plan § 2.5. If the Participant is married, the Beneficiary is automatically the Participant's surviving spouse, unless the surviving spouse consents to another or additional beneficiary. Plan § 2.5(a).

The Plan's "Nonalienation of Benefits" section provides:

> No person shall have any interest in or right to any assets of the Trust Fund or any rights under the Plan except to the extent expressly provided in the Plan. Benefits payable under the Plan shall not be includible in the Participant's bankruptcy estate nor subject in any manner to bankruptcy, anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, charge, garnishment, execution, or levy of any kind, either voluntary or involuntary, including any liability for alimony or other payments for the support of a spouse, former spouse, or for any other relative of a Participant or Beneficiary, before actually being received by the person entitled thereto under the terms of the Plan <u>except pursuant to a qualified domestic relations order</u> within the meaning of Section 414-(p) of the Code or any

> judgment, decree, order or settlement as permitted under Section 401(a)(13)(C) of the Code. Any attempt to anticipate, alienate, sell, transfer, assign, pledge, encumber, charge or otherwise dispose of any right to benefits payable under the Plan shall be void.

Plan § 10.1 (emphasis added). Once the plan administrator receives a DRO "that purports to require the payment of a Participant's benefits to a person other than the Participant," it must determine whether the order meets the requirements of a QDRO. Plan § 11.8 (emphasis added).

The Plan makes clear that where a Participant dies while in the employ of Dominion Resources, Inc., his vested Accounts "shall be paid to his surviving spouse." Plan § 6.4. Additionally, the Plan gives the beneficiaries of deceased Participants with account balances the ability to direct the investment of their accounts. Plan § 9.5.

Legal Authority Is Divided on the Issue of Vesting upon Death or Retirement of the Participant.

A split of authority exists on whether retirement benefits vest in the beneficiary at the plan participant's death and whether a DRO can divest those benefits from a beneficiary after the plan participant's death. The Supreme Court of Virginia has adopted the view of the Virginia Court of Appeals that "the right of the children to 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 . . .' The QDRO is simply an administrative

mechanism to enforce these rights that accrue under state law." *Griffin*, 753 S.E.2d at 588-89. *Yale-New Haven Hosp. v. Nicholls*, No. 13-4725-cv, 2015 U.S. App. LEXIS 9294, at *16-17 (2d Cir. 2015) similarly held that an order entered nunc pro tune effectively assigned benefits to the alternate payee before the plan participant's death and before any interest in the plan could have vested with the surviving spouse and that "where a plan administrator must determine whether a domestic relations order is a QDRO, any interest in plan benefits does not vest automatically with a surviving spouse."

In contrast, *Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153, 156-57 (4th Cir. 1997) found a post-retirement QDRO invalid because the surviving spouse benefits vested in the current spouse on the date of a participant's retirement. Likewise, *Samaroo v. Samaroo*, 193 F.3d 185, 190 (3d Cir. 1999) held a post-death QDRO invalid because the right to plan benefits should be determined as of the day of the plan participant's death, See also *Rivers v. Cent. & .SW Corp.*, 186 F.3d 681 (5th Cir. 1999); *Langston v. Wilson McShane Corp.*, 828 N.W.2d 109 (Minn. 2013).

Ultimately, the Supreme Court of the United States will need to resolve this split of authority, perhaps in this very case.

Determination.

The plan administrator believes that whether or not Cowser-Griffin became vested in David Griffin's account upon his death is governed by ERISA and not by Virginia law. Although courts disagree on what

ERISA requires, the plan administrator finds that the DRO submitted by Sandra Griffin does not meet the requirements of a QDRO under the terms of the Plan for the following reasons:

- Until other controlling court authority issues, the plan administrator must give controlling weight to the *Hopkins* decision of the Fourth Circuit, which is controlling ERISA authority here in Virginia.
- The Supreme Court of the United States has repeatedly emphasized that plan administrators in enforcing QDROs should follow the "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*, 555 U.S. at 300 (quoting *Egelhoff*, 532 U.S. at 148).
- In *Kennedy*, the Supreme Court emphasized the importance of the plan administrator following the clear rule of following plan documents, noting that the Supreme Court had held that ERISA preempted state laws that could blur the bright-line requirement to follow plan documents. Id. at 302-03 (citing *Egelholf*, 532 U.S. at 147 n.1; and *Boggs v. Boggs*, 520 U.S. 833, 850 (1997)).
- The Plan expressly provides that upon David Griffin's death while still a Dominion employee, his account "shall be paid to his surviving spouse," Cowser-Griffin. Plan § 6.4(a). As of David Griffin's death, Cowser-

Griffin had the right under the terms of the Plan to direct account investments and to take a distribution of the account. Plan §§ 6.4, 9.5. Enforcing the DRO requested by Sandra Griffin would divest Cowser-Griffin of those rights and disrupt the orderly and predictable "bright-line" administration of the Plan that ERISA, as interpreted by the U.S. Supreme Court, requires.

- Upon David Griffin's death, his interest in the Plan transferred to Cowser-Griffin. Under Section 11.8 of the Plan, "a domestic relations order that purports to require the payment of a Participant's benefits to a person other than the Participant" can potentially qualify as a QDRO. The DRO in this case seeks to transfer benefits that, under the terms of the Plan, belong to Cowser-Griffin, not to the deceased Participant. The Plan language contemplates that the benefits are taken from the Participant, not from the Beneficiary following the death of the Participant.
- Sandra Griffin delayed fourteen years before requesting a QDRO, until after David Griffin's death. She could have protected her rights and her children's consistent with ERISA and the terms of the Plan by obtaining a QDRO before David Griffin's death. The continuing litigation over this issue is the direct result of the failure to obtain a QDRO in the years before David Griffin's death.
- The plan administrator's determination deals with how the Plan must be administered

> under ERISA and does not address state law claims that Sandra Griffin and the Griffin children may have against parties other than the Plan. *See Kennedy*, 555 U.S. at 300 n.10 (*citing Boggs*, 520 U.S. at 853; and *Sweebe v. Sweebe*, 712 N.W. 2d 708, 712-13 (Mich. 2006)).

Conclusion.

Under the terms of the Plan, upon David Griffin's death, his interest in the Plan transferred to Cowser-Griffin. The DRO cannot qualify as a QDRO under the terms of the Plan because it seeks to assign to the Alternate Payees the right to receive benefits already payable to Cowser-Griffin. Plan § 11.8; *see also* 29 U.S.C. § 1056(d)(3)(B)(i). Although Sandra Griffin and the Griffin children may have rights under Virginia law against other parties, ERISA, not Virginia law, controls how the Plan administers benefits.

Although the plan administrator has determined that the DRO should not be qualified, it recognizes the law is not settled and that the parties continue to litigate their competing claims. The Plan's only interest in this matter is to determine the proper beneficiary or beneficiaries to David Griffin's Account. The Plan cannot distribute the Account Balance without the risk of being subjected to multiple competing claims by the parties and the costs, expenses, and multiple payments potentially resulting from such multiple claims or suits. For this reason, the plan administrator has initiated an interpleader complaint in the United States District Court for the Eastern District of Virginia, Richmond Division.

In the meantime, the administrative hold on David Griffin's account will remain in place. The parties may submit additional information for consideration by the plan administrator if they choose to do so. Any questions or communications should be directed to J. Scott Robinson, counsel for Dominion Resources Services, Inc., 120 Tredegar Street, Richmond, VA 23219, 804-819-2250.

Very truly yours,

For Dominion Resources Services, Inc.

/s/ Marlene K. Zeigler
Marlene K. Zeigler
Senior Human Resources Specialist

Cc: J. Scott Robinson, Deputy General Counsel
Wendy Wellener, Vice President of Human Resources

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DOMINION RESOURCES, INC.
DOMINION SALARIED
SAVINGS PLAN,
and
DOMINION RESOURCES
SERVICES, INC.,

Interpleader Plaintiffs,

Case No. 3:15cv00407

v.

ESTATE OF DAVID
L. GRIFFIN, KIMBERLY
COWSER-GRIFFIN,
SANDRA D.T. GRIFFIN,
GLORIA D. GRIFFIN,

and

JAMES J. GRIFFIN, III,

Interpleader Defendants.

INTERPLEADER COMPLAINT

Interpleader Plaintiffs Dominion Resources, Inc., Dominion Salaried Savings Plan, and Dominion Resources Services, Inc., by and through their

undersigned counsel and pursuant to Rule 22 of the Federal Rules of Civil Procedure, state as follows for their Interpleader Complaint:

NATURE OF ACTION

1. This is an action for interpleader to determine entitlement to benefits payable under the Dominion Salaried Savings Plan (the "Plan"), an employee pension benefit plan maintained pursuant to and governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq*. ("ERISA"). See Exhibit A, Dominion Salaried Savings Plan.

2. This action is brought under 29 U.S.C. § 1132(a)(3)(B)(ii), which states: "[a] civil action may be brought ... by a ... fiduciary ... to obtain other appropriate equitable relief to enforce ... the terms of the plan[.]"

3. Decedent, David L. Griffin, participated in the Plan during his employment with Dominion Resources, Inc. and accrued certain benefits under the Plan ("the Griffin Plan Account").

4. This Interpleader Complaint is necessary because the Plan Administrator has received notice of conflicting claims to the Griffin Plan Account from Interpleader Defendant Kimberly Cowser-Griffin, as surviving spouse of David L. Griffin, and from Gloria D. Griffin and James J. Griffin, III, children of the decedent David L. Griffin ("the Griffin Children"), as alternate payees under a domestic relations order ("the DRO").

5. The Plan Administrator has determined that the DRO does not meet the requirements of a

Qualified Domestic Relations Order ("QDRO") under the teens of the Plan and ERISA because Sandra D.T. Griffin, the former spouse of David L. Griffin, did not seek the DRO until after David L. Griffin's benefits had vested in Ms. Cowser-Griffin as a result of David L. Griffin's death. Exhibit B, Letter from Marlene K. Zeigler to Gloria D. Griffin, James J. Griffin, III, J. Roger Griffin, Jr., Kimberly Cowser-Griffin, and W. Hunter Old (July 9, 2015). The Plan Administrator believes this result is required by the decision of the Court of Appeals for the Fourth Circuit in *Hopkins v. AT&T Global Information Solutions, Co*., 105 F.3d 153 (4th Cir. 1997) and the decisions of the Supreme Court of the United States in *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, 555 U .S . 285, 300 (2009), *Egelhoff v. Egelhoff*; 532 U.S. 141, 148 (2001), and *Boggs v. Boggs*, 520 U.S. 833, 850 (1997).

6. The Supreme Court of Virginia, in litigation in which Interpleader Plaintiffs were not parties, has distinguished *Hopkins* and ruled that the Griffin Plan Account vested in the Griffin Children at the time of David L. Griffin's divorce from Sandra D.T. Griffin in 1998. The judgment of the Supreme Court of Virginia is the subject of a petition for a writ of certiorari now pending before the Supreme Court of the United States.

7. As a result, Interpleader Plaintiffs are exposed to multiple liabilities with respect the disposition of the Griffin Plan Account absent court resolution of the competing claims.

PARTIES

8. Interpleader Plaintiff Dominion Resources, Inc. ("Dominion") is a corporation organized under the laws of the Commonwealth of Virginia, has its principal place of business in Richmond, Virginia, and is the plan sponsor of the Plan.

9. Interpleader Plaintiff Dominion Resources Services, Inc. is the Plan Administrator of the Plan.

10. Interpleader Defendant David L. Griffin, deceased, is a fowler Dominion employee and participant in the Plan. He died on or about May 26, 2012.

11. Interpleader Defendant Kimberly Cowser-Griffin is David L. Griffin's surviving spouse and second wife. She is also David L. Griffin's beneficiary under the Plan both by his designation and under the terms of the Plan. Upon information and belief, she currently resides in Dendron, Virginia.

12. Interpleader Defendant Sandra D.T. Griffin is David L. Griffin's former spouse and first wife. Upon information and belief, she currently resides in Virginia Beach, Virginia.

13. Interpleader Defendants Gloria D. Griffin and James J. Griffin, III are David L. Griffin's children from his first marriage. Sandra D.T. Griffin claims that a 1998 Separation and Property Settlement Agreement ("PSA") between her and David L. Griffin makes Gloria D. Griffin and James J. Griffin, III co-beneficiaries under the Plan. Upon information and belief, Gloria D. Griffin and James J. Griffin, III currently reside in Virginia Beach, Virginia.

JURISDICTION AND VENUE

14. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action arises under the laws of the United States, specifically the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001 *et seq*., and the Internal Revenue Code of 1986, as amended (the "IRC"), 26 U.S.C. §§ 1 *et seq*.

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

FACTUAL BACKGROUND

16. At the time of his death, David L. Griffin was employed by Dominion and was a participant in the Plan.

17. The Plan is an employee pension benefit plan maintained pursuant to and governed by ERISA, *see* 29 U.S.C. § 1002(2), and is tax-qualified under 26 U.S.C. § 401(a) *et seq*.

18. As of the date of David L. Griffin's death, the balance in the Griffin Plan Account was approximately $372,056.18.

19. Section 2.5(a) of the Plan provides that, upon the death of a married participant, the beneficiary is automatically the participant's surviving spouse. If the participant wishes to designate a beneficiary other than his or her spouse, the designation must be made with the spouse's consent. Exhibit A, Dominion Salaried Savings Plan § 2.5(a).

20. Absent the Plan's automatic designation of the surviving spouse as the Participant's Beneficiary as provided in Section 2.5(a), the Plan would be subject

to the qualified joint and several annuity provisions of 29 U.S.C. § 1055(b)(1)(C) and 26 U.S.C. § 401(a)(11)(B)(iii).

21. The most recent beneficiary designation executed by David L. Griffin is dated December 18, 2007, about four-and-a-half years before his death, and designates Ms. Cower-Griffin as the primary beneficiary of the Griffin Plan Account and Gloria D. Griffin and James J. Griffin, III as contingent co-beneficiaries of the Griffin Plan Account. Exhibit C, Dominion Savings Plan Beneficiary Designation.

22. ERISA and the IRC generally require that "benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1); 26 U.S.C. § 401(a)(13). A QDRO is an exception to this anti-alienation rule. 29 U.S.C. § 1056(d)(3); 26 U.S.C. § 401(a)(13).

23. Under Section 11.8 of the Plan, if the Plan Administrator receives a DRO that purports to require payment of a Participant's benefits to a person other the Participant, the Plan Administrator shall take certain steps to determine whether the DRO is a QDRO under the provisions of Section 414(p) of the IRC. Exhibit A, Dominion Salaried Savings Plan § 11.8(a).

24. In October 2012, over four months after David L. Griffin's death, the Plan received notice from counsel for Sandra D.T. Griffin of the PSA in which David L. Griffin agreed that the Griffin Children would be co-beneficiaries in the Plan. Counsel for Sandra D.T. Griffin presented Dominion with a draft DRO for review. See Exhibit D, Letter from J. Roger Griffin, Jr. to Marlene Zeigler (October 5, 2012).

Sandra D.T. Griffin also initiated an action in the Virginia Circuit Court of the County of Sussex (the "Circuit Court") against the Estate of David L. Griffin to enforce the terms of the PSA through the entry of the DRO.

25. Dominion notified Ms. Cowser-Griffin of the draft DRO and informed her that an administrative hold had been placed on the account until the qualified status of the order could be determined. See Exhibit E, Letter from Marlene K. Zeigler to Kimberly Cowser-Griffin (October 10, 2012).

26. By letter dated October 29, 2012, Dominion notified Sandra D.T. Griffin and Ms. Cowser-Griffin that the Plan Administrator had concluded that the draft order would not be treated as a QDRO in light of an October 22, 2012 decision in which a federal district court upheld the Plan Administrator's determination that a DRO was not qualified because the order impermissibly required payment to the former spouse of an amount that was effectively vested in the current spouse. However, recognizing the parties' competing claims and the ongoing litigation in state court, the Plan continued the administrative hold on David L. Griffin's account. See Exhibit F, Letter from Marlene K. Zeigler to J. Roger Griffin, Jr. and W. Hunter Old (October 29, 2012).

27. On March 14, 2013, the Circuit Court denied Sandra D.T. Griffin's motion for a DRO appointing the Griffin Children as alternate payees of the Griffin Plan Account, finding that "under controlling federal law" David L. Griffin's retirement benefits had vested entirely in the surviving spouse, the beneficiary under the Plan, once he had passed away.

> 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.

Griffin v. Griffin, Case No.: CH98000034 (Va. Cir. Ct. Mar. 14, 2013), attached as Exhibit G.

28. In a 2-1 decision issued in January 2014, the Court of Appeals of Virginia reversed the Circuit Court's decision. *Griffin v. Griffin*, 753 S.E.2d 574 (Va. Ct. App. 2014). The majority distinguished *Hopkins v. AT&T Global Information Solutions, Co.*, 105 F.3d 153 (4th Cir. 1997), in which the United States Court of Appeals for the Fourth Circuit held that the retirement benefits at issue vested in the participant's current spouse on the date the participant retired. *Griffin*, 753 S.E.2d at 587. In the majority's view, *Hopkins* was not persuasive on the subject of vesting because it involved different benefits from those at issue in the Griffin case. *Id.* The majority concluded that "benefits did not vest in Cowser-Griffin at Mr. Griffin's death" and directed the Circuit Court to enter the DRO:

> [T]he right of the children to 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.

Id. at 588-89.

29. In dissent, Judge Huff observed that "[t]his 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." *Id*. at 592 (Huff, J., dissenting). In the view of the dissenting judge, "a surviving spouse's vested rights may not be divested by a posthumous QDRO." *Id*. at 593 (*citing Hopkins*, 105 F.3d at 156-57; *Carmona v. Carmona*, 544 F.3d 988 (9th Cir. 2008); and *Rivers v. Cent. & S.W. Corp*., 186 F.3d 683 (5th Cir. 1999)).

30. In February 2015, the Supreme Court of Virginia, in a 4-3 decision, affirmed the decision of the Court of Appeals of Virginia "for the reasons stated in the majority opinion of the Court of Appeals." *Cowser-Griffin v. Griffin*, 771 S.E.2d 660, 660 (Va. 2015). The three dissenting justices reasoned that "the benefits at issue became vested in Mrs. Cowser-Griffin at the time of Mr. Griffin's death," a result "consistent with the majority of ERISA case law." *Cowser-Griffin*, 771 S.E.2d at 662 (Millette, J., dissenting).

31. Following the mandate of the Supreme Court of Virginia, the Circuit Court entered a DRO on May 18, 2015 naming Gloria D. Griffin and James J.

Griffin, III as alternate payees to David L. Griffin's benefits in the Plan. The DRO provides that "no amounts shall be distributed to the Alternate Payees prior to the time the Plan Administrator determines that this Order is a Qualified Domestic Relations Order within the meaning of Code §414(p) and ERISA §206(d)." Qualified Domestic Relations Order, *Griffin v. Griffin*, No. CL98-34-01, at 2 (Va. Cir. Ct. May 18, 2015), attached as Exhibit H.

32. Interpleader Plaintiffs were not parties to the litigation in Virginia state court and are not bound by the Supreme Court of Virginia's decision.

33. In May 2015, counsel for Sandra D.T. Griffin submitted the DRO to Dominion for "execution." Exhibit I, Letter from J. Roger Griffin, Jr. to Marlene K. Zeigler (May 21, 2015).[3]

34. That same month, counsel for Ms. Cowser-Griffin notified Dominion of her intent to file a petition for a writ of certiorari to the Supreme Court of the United States. Ms. Cowser-Griffin asked that Dominion not release the Griffin Plan Account until the Supreme Court of the United States either denied the petition or rendered a decision after accepting the petition. Exhibit J, Letter from W. Hunter Old to Marlene Zeigler (May 28, 2015).

35. On June 10, 2015, the Plan Administrator notified Interpleader Defendants of its receipt of the DRO and the procedures that would be followed to determine whether it satisfied the QDRO requirements set forth in the IRC and ERISA. Exhibit K, Letter from Marlene K. Zeigler to Gloria

[3] This letter is mistakenly dated 2014.

D. Griffin, James J. Griffin, III, J. Roger Griffin, Jr., Kimberly Cowser-Griffin, and W. Hunter Old (June 10, 2015).

36. On June 24, 2015, David L. Griffin's Estate filed a petition for a writ of certiorari with the Supreme Court of the United States. Petition for a Writ of Certiorari, *Cowser-Griffin v. Griffin*, No. 14-1531, 2015 WL 3918905 (June 24, 2015), attached as Exhibit L.

37. On July 9, 2015, the Plan Administrator determined that the DRO did not meet the requirements of a QDRO under the terms of the Plan because Sandra D.T. Griffin did not seek the DRO until after David L. Griffin's benefits had vested in Ms. Cowser-Griffin upon the death of David L. Griffin. Exhibit B, Letter from Marlene K. Zeigler to Gloria D. Griffin, James J. Griffin, III, J. Roger Griffin, Jr., Kimberly Cowser-Griffin, and W. Hunter Old (July 9, 2015).

CLAIM IN INTERPLEADER

38. Interpleader Plaintiffs incorporate and reinstate the allegations in Paragraph 1 through 37 of the Interpleader Complaint as if fully set forth herein.

39. Ms. Cowser-Griffin has advised Interpleader Plaintiffs that she is claiming one hundred percent of the Griffin Plan Account as David L. Griffin's surviving spouse.

40. Sandra D.T. Griffin has advised Interpleader Plaintiffs that her children, Gloria D. Griffin and James J. Griffin, III, claim one hundred percent of

the Griffin Plan Account as David L. Griffin's co-beneficiaries under the PSA and subsequent DRO.

41. A split of authority exists on whether retirement benefits vest in the beneficiary at the plan participant's death and whether a QDRO can divest those benefits from a beneficiary after the plan participant's death. *Compare Yale-New Haven Hosp. v. Nicholls*, No. 13-4725-cv, 2015 U.S. App. LEXIS 9294, at *1647 (2d Cir. 2015) (holding that a QDRO entered *nunc pro tunc* effectively assigned benefits to the alternate payee before the plan participant's death and before any interest in the plan could have vested with the surviving spouse and that "where a plan administrator must determine whether a domestic relations order is a QDRO, any interest in plan benefits does not vest automatically with a surviving spouse") and *Cowser-Griffin v. Griffin*, 771 S.E.2d 660, 660 (Va. 2015), *with Samaroo v. Samaroo*, 193 F.3d 185, 190 (3d Cir. 1999) (holding a post-death QDRO invalid because the right to plan benefits should be determined as of the day of the plan participant's death) and *Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153, 156-57 (4th Cir. 1997) (finding a post-retirement QDRO invalid because the surviving spouse benefits vested in the current spouse on the date of a participant's retirement).

42. A significant issue, therefore, exists regarding how the Griffin Plan Account should properly be distributed, so as to comply with applicable federal law.

43. The Plan's only interest in this matter is to ensure that the Griffin Plan Account is distributed to the proper beneficiary or beneficiaries.

44. Interpleader Plaintiffs cannot distribute the Griffin Plan Account without the risk of being subjected to multiple claims by Interpleader Defendants and the costs, expenses, and multiple payments potentially resulting from such multiple claims or suits.

45. All interested persons have been made parties to this action.

46. Pursuant to 29 U.S.C. § 1132(a)(3), Interpleader Plaintiffs seek appropriate equitable relief; to wit, a determination of the proper beneficiary or beneficiaries of the Griffin Plan Account and Interpleader Plaintiffs' discharge from liability arising in connection with their distribution of the same.

REQUEST FOR RELIEF

WHEREFORE, Interpleader Plaintiffs request entry of an order:

(i) Restraining and enjoining Interpleader Defendants from instituting any action or proceeding in any state or federal court against Interpleader Plaintiffs for distribution of the Griffin Plan Account, by reason of the death of David L. Griffin;

(ii) Requiring that Interpleader Defendants litigate or settle and adjust between themselves their claims to the Griffin Plan Account, or, upon their failure to do so, that this Court settle and adjust their claims and determine to whom the Griffin Plan Account should be distributed;

(iii) Permitting the Plan to continue to retain the Griffin Plan Account until such time as Interpleader Defendants' claims to the Griffin Plan Account have been settled or determined;

(iv) Dismissing Interpleader Plaintiffs from this action, with prejudice, and discharging Interpleader Plaintiffs from any further liability for the Griffin Plan Account payable as a consequence of the death of David L. Griffin;

(v) Awarding Interpleader Plaintiffs their costs and attorneys' fees; and

(vi) Awarding Interpleader Plaintiffs such other and further relief as this Court deems just, equitable, and proper.

This 9th day of July, 2015.

Respectfully submitted,

By: /s/ James P. McElligott Jr.

James P. McElligott (VSB No. 14109)
MCGUIRE WOODS LLP
800 East Canal Street
Richmond, VA 23219-3916
804.775.4329
804.698.2111 (facsimile)
jmcelligott@mcguirewoods.com

Summer L. Speight (VSB No. 80957) MCGUIRE WOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219-3916
804.775.1839
804.698.2128 (facsimile)
sspeight@mcguirewoods.com

Counsel for Plaintiffs Dominion Resources, Inc., Dominion Salaried Savings Plan, and Dominion Resources Services, Inc.