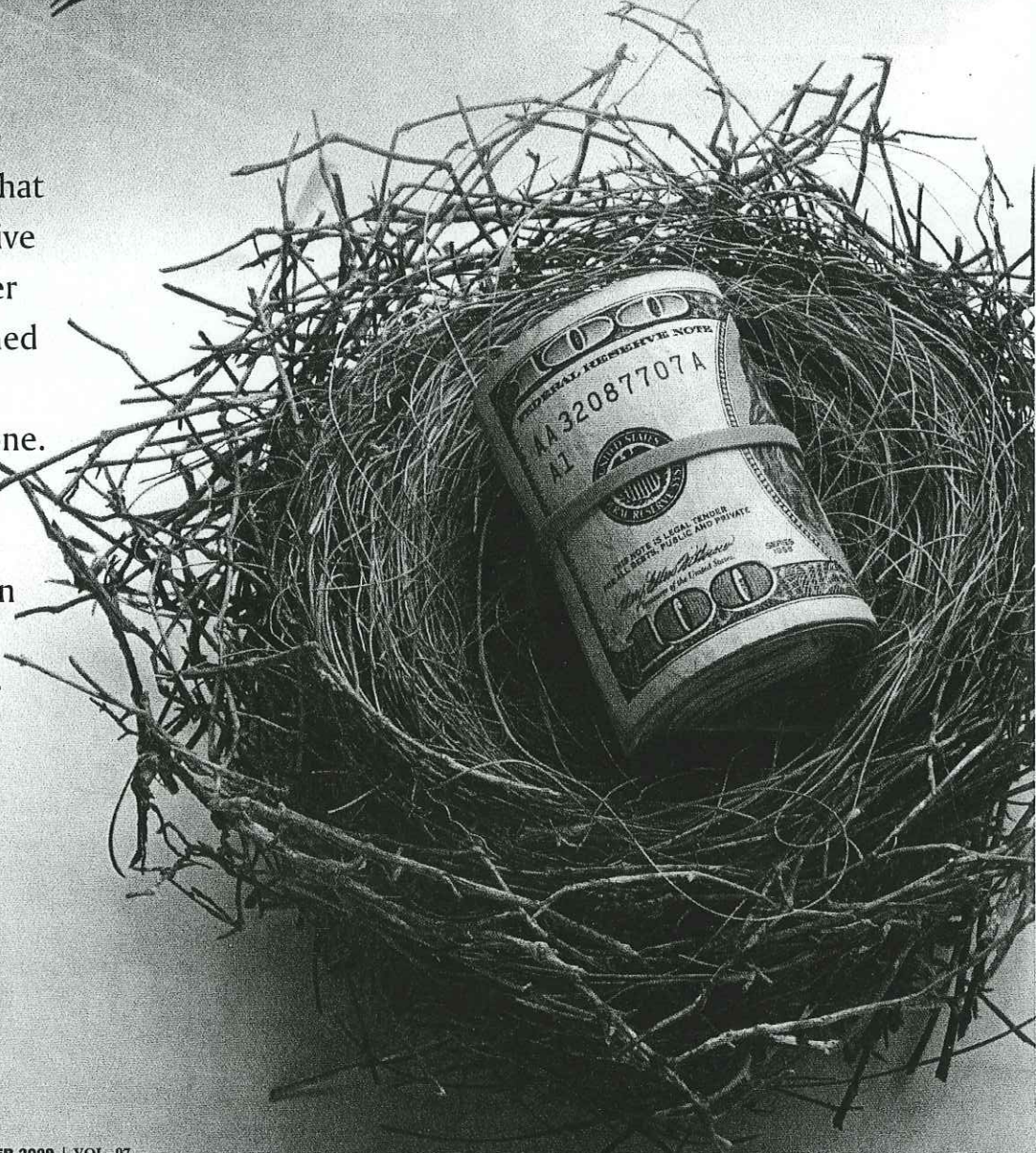


By Leon I. Finkel and Hailee R. Bloom

Changing Pension Beneficiaries After Divorce: It's More Important After Kennedy

Divorce Bell

A recent U.S. Supreme Court decision holds that an ex-spouse can't waive her interest in a former spouse's ERISA-governed pension plan through the divorce decree alone. Thus, former spouses must change the beneficiary designation or risk inadvertently enriching their former partners.



Early this year, the United States Supreme Court issued a decision on a cutting edge family law issue that has broad implications for divorcing pension plan participants across the country.¹

The Supreme Court reviewed the 2007 decision by the U.S. Court of Appeals for the Fifth Circuit in the case of *Kennedy v Plan Adm. for DuPont Savings and Investment Plan*.² The high court determined that an ex-wife, as named beneficiary to her deceased ex-husband's pension plan, was entitled to his pension benefits even though she had waived the designation in the parties' divorce decree.

The Supreme Court's decision in *Kennedy* resolved the split among various state and federal jurisdictions, many of which had held that a divorce decree is sufficient to waive an ex-spouse's interest in her former spouse's pension plan, even if the decedent had not removed the ex-spouse as beneficiary.

As a result, it is now more important than ever in a divorce for the employee-spouse to properly change beneficiaries when the other spouse waives his or her interest in the employee-spouse's ERISA governed pension plan.

The high court rejects the majority view

Before *Kennedy*, courts determining whether or not to give effect to waivers contained in divorce decrees were generally split into two camps: the "federal common law" courts and the "plan documents" courts.

The majority took the "federal common law" approach, which is a strategy often employed by courts when they are compelled to consider federal questions that cannot be answered by the federal statutes alone.³ By looking to the "federal common law," courts give themselves leeway to look at the surrounding circumstances in a particular case – for example, language waiving benefits in the divorce decree – instead of rigidly focusing on the statutory language.

The seventh circuit was among the federal common law courts. In *Fox Valley & Vicinity Const Workers Pension Fund v Brown*⁴ (which originated in the northern district of Illinois), the court determined that Laurine Brown was not entitled to her ex-husband James Brown's pension benefits because, in their divorce decree, Laurine waived her interest in James' pension through the following language: "The parties each waive any interest or claim in and to any retirement, pension, profit-sharing and/or annuity plans resulting from the employment of the other party." The court based its decision on the absence of any language regarding waiver in the ERISA statute and that plan administrators are required to investigate the marital history of a participant to determine whether any facts exist that could affect the distribution of plan benefits.

The minority of courts took the "plan documents" approach, whereby courts refuse to look at the divorce decree or other evidence outside of corporate plan documents in determining whether or not a divorcing spouse waived his or her interest in the employee spouse's pension plan.⁵

In *Kennedy*, the U.S. Supreme Court sided with the divorcing ex-spouse, though – as is explained below – the justices departed from the "plan documents" rationale as articulated by some courts.

Kennedy facts and lower court rulings

William Patrick Kennedy was an employee of E. I. DuPont de Nemours and Company who participated in its employee pension plan, which was governed by the Employee Retirement Income Security Act (ERISA). In 1971, William married Liv Kennedy and subsequently designated her the sole beneficiary of his pension plan with DuPont.

William and Liv later divorced, and Liv waived her interest in William's pension plan in their final divorce decree. After the

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divorce, however, William failed to remove or replace Liv as the designated beneficiary on his pension plan.

William retired from DuPont in 1998 and died in 2001. He was survived by Liv and their daughter Kari. Kari, as executrix of William's estate, wrote a letter to DuPont requesting that his

1. *Kennedy v Plan Adm. for Dupont Sav and Inv Plan*, 129 S Ct 865 (2009).

2. 497 F3d 426 (5th Cir 2007), cert granted in part by 128 S Ct 1225 (2008).

3. See *Estate of Altobelli v IBM Corp*, 77 F3d 78 (4th Cir 1996); *Fox Valley & Vicinity Const Workers Pension Fund v Brown*, 897 F2d 275 (7th Cir 1990); *Araizaklier v Teachers Ins and Annuity Assn*, 2001 WL 1517391 (Cal App 4th D 2001); Texas Supreme Court case *Keen v Weaver*, 121 SW3d 721 (Tex 2003); *Von Haden v Supervised Estate of Von Haden*, 699 NE2d 301, 304 (Ind Ct App 1998) (stating that, although the settlement agreement was not a QDRO – and thus did not allow participant to assign his interest in the plan – the anti-alienation provisions of ERISA allows beneficiaries to waive their interests in ex-spouse's benefits); *Wennett v Capone*, 1996 WL 91931, *4 (Mass Super 1996) (stating that ex-wife's waiver of her beneficiary rights in divorce decree was valid, notwithstanding the fact that it was not part of a QDRO, because it was voluntary, explicit, and specific and ERISA allows beneficiaries to waive their interests in benefits, see 29 USC §1055(c)(1)(A)(i)(i) (allowing spouse to waive interest in joint and survivor benefit)); *Moore v Moore*, 266 Mich App 96, 103, 700 NW2d 414, 415-16 (2005) (stating that a waiver of ERISA-regulated pension benefits is valid if, using a "reasonable person" standard, the waiver is explicit, voluntary, intentional, and made in good faith); *Strong v Omaha Const Industry Pension Plan*, 270 Neb 1, 7, 701 NW2d 320, 327 (2005) (stating that if a divorce decree is unambiguous and manifests non-participant spouse's intent to waive his or her interest in the ERISA-governed death pension benefit, then it is an effective means of waiver even if the participant spouse fails to change the beneficiary designation after the divorce); *In re Amarante*, 14 Misc 3d 834, 840, 829 NYS 2d 859, 865 (2006); *Silber v Silber*, 99 NY2d 395, 786 NE2d 1263 (2003).

4. 897 F2d 275 (7th Cir 1990).

5. *McGowan v NJR Service Corp*, 423 F3d 241 (3d Cir 2005); *McMillan v Parrot*, 913 F2d 310 (6th Cir 1990) and *Czarski v Bonk*, 124 F3d 197 (6th Cir 1997) (unpublished opinion); *Smith v E. I. DuPont de Nemours & Co*, 402 F Supp 2d 519 (D Del 2005) (stating that although ERISA does not strictly state that waivers are prohibited, recognition of the waiver sought in this case would undermine the anti-alienation provisions of ERISA as a waiver in this context is the functional equivalent of an assignment of benefits from a former spouse to another); *Hallingby v Hallingby*, 541 F Supp 2d 591, 599 (SDNY 2008) (stating that a "waiver" in the ERISA context is not merely a refusal of benefits, but functions as an "anticipatory gift to whoever is next in line under the Plan's rules" and thus, according to the anti-alienation provision of ERISA, this is an indirect arrangement that requires a QDRO).

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pension benefits be distributed to the estate, stating that Liv had waived her interest in the benefits in the divorce decree. DuPont refused and instead paid approximately \$400,000 in pension benefits to William's ex-spouse, Liv, because she was still the designated beneficiary according to the plan documents. William's estate requested that Liv relinquish the \$400,000 in benefits, but she refused.

benefits in their divorce decree, William's employer did not err in paying her the proceeds of William's pension when he died.

Surprisingly, the Supreme Court broke with the reasoning of many "plan documents" courts confronted with this issue⁷ and determined that Liv Kennedy's entitlement to William Kennedy's pension benefits was not predicated on the fact that the parties failed to file a QDRO post-dissolution. In fact, the Supreme Court stated, not only was a QDRO not required, it was not even applicable in a situation such as this (where a divorcing spouse is not to receive any interest whatsoever in the participant's plan).

The Court explained that a QDRO, by definition, requires that the docu-

ment "creat[e] or recogni[ze] the existence of an alternate payee's right to.... receive all or a portion of the benefits payable with respect to a participant under a plan."⁸ Thus, a QDRO is not the proper instrument to effectuate a waiver contained in a divorce decree, because the employee-spouse who owns the pension does not qualify as an "alternate payee" – a spouse, former spouse, child or other dependent of a participant – under ERISA.

By awarding the pension benefits to William's ex-wife – the unintended beneficiary according to the divorce decree – the Supreme Court emphasized to pension plan participants everywhere the undeniable importance of following their pension plan's specific procedures to remove a designated beneficiary. In flatly rejecting the approach taken by the "federal common law" courts,⁹ the Court displayed its concern that permitting divorce decrees to constitute effective waivers would require plan administrators to inquire into the divorcing spouse's intent and the circumstances surrounding the execution of the waiver – all of which are considerations patently outside a plan administrator's function.

Instead, by requiring participants to file the appropriate documents under plan procedure and directing plan administrators to pay out benefits in accordance

with the documents and instruments on file, the Supreme Court sought to further the goal of a uniform administrative scheme in the application of ERISA and to eliminate litigation in the future.

How to assure that pension waivers take effect

In light of the *Kennedy* decision, it is extremely important for divorcing spouses and their attorneys to take all the necessary precautions and follow the correct procedures when one spouse waives his or her interest in the employee-spouse's ERISA governed pension plan.

To ensure that a divorcing spouse's intent to waive her interest in the pension plan is effectuated, lawyers must get the proper forms from the plan administrator before the judgment for dissolution is entered and make sure the waiving spouse signs them contemporaneously with the entry of the judgment.

Further, the judgment should explicitly provide that the waiving spouse will take all necessary steps to waive her interest and will sign any such documents upon presentation. Including this type of provision in the decree is especially important where the waiving spouse, after the judgment for dissolution has been entered, is not willing to sign the requisite documents to effectuate the waiver.

Once the waiving spouse executes the necessary documents, the plan participant or his or her attorney must ensure that they are filed with the plan administrator and that the beneficiary designation is effectively changed. ■

6. ERISA provides that a pension plan must prohibit the alienation or assignment of benefits (called the "spendthrift" provisions). See 29 USC §1056(d)(1). These "spendthrift" provisions are designed to prevent unwise alienation or assignment of one's pension. See *AT & T Co v Merry*, 592 F.2d 118, 124 (2d Cir 1979). ERISA was amended in 1984 to clarify the effect of these spendthrift provisions on family support obligations such as alimony, child support, and separate maintenance. See Pub L No 98-397, 98 Stat 1426 (West 1984). The 1984 amendments created a limited exception to the anti-alienation provisions for a state domestic relations order (allowing alienation or assignment of pension benefits) if it is a "qualified domestic relations order" (QDRO). See 29 USC §1056(d)(3)(A). Certain conditions must be met for a state domestic relations order to qualify as a QDRO. See 29 USC §1056(d)(3)(B)(ii). The ERISA QDRO provisions do not expressly speak to waiver.

7. See generally, *Kennedy*; *McGowan*; *McMillan*; *Czarski*; *Smith*; and *Hallingby*.

8. *Kennedy*, 129 S Ct at 873, quoting 29 USC §1056(d)(3)(B)(i)(I).

9. See generally, *Altobelli*; *Fox Valley*; *Araiza-Klier*; *Keen*; *Von Haden*; *Wenmett*; *Moore*; *Strong*; *Amarante*; *Silber*; and *In re Marriage of Rahn*, 914 P.2d 463 (Colo App 1995).

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William's estate sued DuPont in the U.S. District Court for the Eastern District of Texas to recover the pension benefits alleged to have been wrongfully paid to Liv. The district court awarded the pension benefits to William's estate because it found that Liv had waived her interest in the benefits in the divorce decree.

DuPont appealed, and the U.S. Court of Appeals for the Fifth Circuit held that Liv was still entitled to William's pension benefits, notwithstanding the fact that she was William's ex-spouse and had specifically waived her right to the benefits in the parties' divorce decree. The fifth circuit stated that the only way Liv could effectively waive her right to William's pension benefits was by filing a document with DuPont that was required under ERISA, called a Qualified Domestic Relations Order (QDRO),⁶ specifically relinquishing her interest. The fifth circuit declared that because it was not a QDRO, Liv's voluntary and intentional waiver of her interest in William's pension benefits contained in the divorce decree was ineffective, and ordered that the benefits be paid to Liv.

The U.S. Supreme Court's opinion

The unanimous decision, written by Justice Souter, stated that although Liv Kennedy had waived her interest in her ex-husband William Kennedy's pension