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No. 07-636

In the Supreme Court of the United States

KARI E. KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, DECEASED,
Petitioner,

v.

PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN, E.I. DUPONT DE NEMOURS & COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST[1]

AARP is a nonpartisan, nonprofit membership organization of nearly 40 million people age 50 or older, working or retired, dedicated to addressing the needs and interests of older persons. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance quality of life for all. As a method of promoting independence, AARP attempts to foster the economic security of individuals as they age by seeking to increase the availability, security, equity, and adequacy of public and private pension, health, disability, and other employee benefits.

As part of its advocacy efforts to ensure, to the greatest extent possible, that participants and beneficiaries receive the benefit of ERISA's protections, AARP has participated as *amicus curiae* in numerous cases involving ERISA. *See, e.g.*, *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); *Boggs v. Boggs*, 520 U.S. 833 (1997); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995).

AARP's members and other participants and beneficiaries in private, employer-sponsored employee benefit plans rely on the Employee Retirement Income

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[1] This Brief of *Amicus Curiae* AARP in support of neither party is filed with the consent of both parties. In compliance with Rule 37.6 of this Court, AARP states that no counsel for any party authored this brief in whole or in part, and further, that no party or entity other than *amicus* or its members made a monetary contribution to the preparation or submission of this brief.

Security Act (ERISA) to protect their rights under those plans. ERISA's protections, and the ability to enforce those protections, are of vital concern to older workers, retirees and their designated beneficiaries, since the quality of their lives depends heavily upon the security and amount of their pension and welfare benefits. For most couples who divorce, the value of the retirement assets earned by one or both parties of the couple is one of the two largest marital assets, the other being the value of the equity in their home. Hilary Greer Fike, *Qualified Pension Trends and Divorce Considerations*, 14 AM. J. FAM. L. 234 (2000). Understanding the relationship between state domestic relations law and ERISA is crucial for divorcing couples and their counsel so that they may effectuate the division of martial property that either they have agreed upon or the state court has ordered.

Thus, the decision in this case will have a direct and vital bearing on the economic security of AARP's members and other beneficiaries of employee benefit plans. In light of the significance to its members of the issues presented by this case, AARP respectfully submits this brief *amicus curiae*.

SUMMARY OF ARGUMENT

Section 404(a)(1)(D) of ERISA requires that a plan be operated in accordance with its terms as long as those terms are consistent with the statute. 29 U.S.C. § 1104(a)(1)(D). ERISA states that benefits are to be paid to participants and beneficiaries. 29 U.S.C. §§ 1002(7) & (8). A beneficiary is defined as a person designated by a participant or by the terms of the plan

to receive benefits under the plan. 29 U.S.C. § 1002(8). ERISA expressly identifies three categories of individuals which must be considered beneficiaries under the terms of a plan. First, surviving spouses must be considered beneficiaries under a pension plan unless they have waived their right to a benefit. 29 U.S.C. § 1055. Second, an alternate payee must be considered a beneficiary under a pension plan if a qualified domestic relations order is presented to the plan. 29 U.S.C. § 1056. Third, a child must be considered a beneficiary under a group health plan if a qualified medical child support order is presented to the plan. 29 U.S.C. § 1169. If an individual, like the executrix of Mr. Kennedy's estate does not meet the plan terms, she is not entitled to receive a benefit under the plan.

ARGUMENT

I. PLAN ADMINISTRATORS MUST PAY BENEFITS ONLY TO BENEFICIARIES DESIGNATED IN ACCORDANCE WITH THE PLAN DOCUMENTS.

A. ERISA Requires That Fiduciaries Follow Plan Provisions Unless They Are Inconsistent with the Statute.

The Court has recognized that plan sponsors have significant discretion to determine the design of an ERISA plan as long as ERISA's minimum requirements are met. *See Black & Decker Disability Plan v. Nord,* 538 U.S. at 833 ("employers have large leeway to design disability and other welfare plans as

they see fit."); *cf. Rush Prudential HMO v. Moran*, 536 U.S. 355, 386 (2002) ("whether [the standard of review must be discretionary] is simply a matter of plan design or the drafting of an HMO contract."). However, once the plan sponsor establishes the terms of the plan, "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA]." 29 U.S.C. § 1104(a)(1)(D).

In *Curtiss-Wright*, 514 U.S. 73, the Court determined, "plan administrators appear to have a statutory responsibility actually to run the plan in accordance with the currently operative, governing plan documents . . . " *Id.* at 84. Indeed, the Court consistently has required that plan administrators pay the beneficiary designated in accordance with the plan's provisions without consulting other documents to determine the correct beneficiary. *See Boggs v. Boggs*, 520 U.S. 833, 850 (1997) (concluding that individuals who were not participants or designated as beneficiaries in accordance with the plan documents have no claim to pension benefits); *cf. Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985) (stating plan administrators have a fiduciary duty to provide participants and beneficiaries "with the benefits authorized by the plan.").

In *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), the Court was confronted with a situation not dissimilar to this case. A participant divorced his spouse and failed to change his beneficiary designation before he died.

In order to address this issue, the state of Washington enacted a statute providing that the designation of a spouse as the beneficiary of a non-probate asset is revoked automatically upon divorce. The question before the Court was what law governed – ERISA or the state law. In holding that ERISA preempted the Washington statute, the Court explained:

> The statute . . . implicates an area of core ERISA concern. In particular, it runs counter to ERISA's command that a plan shall "specify the basis on which payments are made to and from the plan," §1102(b)(4), and that the fiduciary shall administer the plan "in accordance with the documents and instruments governing the plan," §1104(a)(1)(D), making payments to a "beneficiary" who is "designated by a participant, or by the terms of [the] plan." §1002(8).

Id. at 147.

Accordingly, "[s]trict adherence to §1104(a)(1)(D) ensures that all interested parties, including participants, beneficiaries, and plan administrators, can identify their rights and duties with certainty, a primary objective of ERISA. This in turn limits costly disputes over the effect of outside documents on the distribution of plan benefits." *McGowan v. NJR Serv. Corp.*, 423 F.3d 241, 246 (3d Cir. 2005) (citing *Est. of Altobelli v. Int'l Bus. Machs. Corp.*, 77 F.3d 78, 82 (4th Cir. 1996) (Wilkinson, C.J., dissenting) (internal citations omitted)).

B. ERISA Mandates Plans to Include Three Specific Plan Terms Conferring the Right to Receive Benefits on Nonparticipants.

ERISA itself mandates that a plan must contain three terms concerning who, other than the participant, may receive benefits from an employee benefit plan. *See generally, Shaw v. Delta Airlines, Inc.,* 463 U.S. 85, 91 (1983). However, the right of nonparticipant spouses or dependents to receive benefits is conferred only under limited and carefully delineated circumstances.

1. A covered pension plan must pay benefits to a surviving spouse unless the spouse has waived her rights.

If a participant in a covered pension plans is married for at least one year, Section 205(a) requires that the plan must provide a surviving spouse annuity. As a consequence, the spouse is automatically a beneficiary to this extent. 29 U.S.C. § 1055(a). This survivor's annuity may not be waived unless the spouse consents in writing to the designation of another beneficiary, witnessed by a plan representative or notary public.[2] 29 U.S.C.

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[2] Significantly, courts have required technical compliance with all of the requirements of Section 205 – a written consent, with a valid signature, properly witnessed to waive the survivor's annuity. *E.g., Lasche v. George W. Lasche Basic Profit Sharing Plan,* 111 F.3d 863, 866 (11th Cir. 1997) (signed waiver is invalid without it being witnessed or notarized); *accord, Hagwood v.*

§ 1055(c)(2)(A). *See also* ERISA § 205(e), 29 U.S.C. § 1055(e) providing a pre-retirement survivor's benefit to the spouse if a participant dies before receipt of a vested pension benefit. If the plan does not include these terms, it will not be considered a qualified trust. IRC § 401(a)(11), 26 U.S.C. § 401(a)(11).

2. A pension plan must pay benefits to an alternate payee if the plan receives a qualified domestic relations order.

Enacted as part of the Retirement Equity Act (REA), qualified domestic relations orders (QDROs) were designed to provide a limited exception to ERISA's anti-alienation provision by specifically permitting the "assignment . . . of a right to any benefit payable with respect to a participant pursuant to" a QDRO.[3] 29 U.S.C. § 1056(d)(3)(A); *see also* 26 U.S.C. § 414(p); *Boggs,* 520 U.S. at 839 (QDRO serves as "a

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Newton, 282 F.3d 285, 290 (4th Cir. 2002) (premarital agreements do not constitute effective waivers under ERISA because "ERISA's formalities must . . . be strictly enforced."); *Nat'l Auto. Dealers & Assocs. Ret. Trust v. Arbeitman,* 89 F.3d 496, 502 (8th Cir. 1996) (same); *Hurwitz v. Sher,* 982 F.2d 778, 782 (2d Cir. 1992) (same). These judicial decisions are consistent with principle that where Congress has established an exception to a general rule, courts have required all elements of the exception to be met in order to enforce the exception. *See, e.g., Ark. Best Corp. v. Comm'r,* 485 U.S. 212, 220 (1988).

[3] ERISA's "anti-alienation provision" was designed to prevent unwise assignment or alienation of plan benefits to "ensure that the employee's accrued benefits are actually available for retirement purposes." H.R. REP. NO. 93-779, at 66 (1974); *accord, Boggs,* 520 U.S. at 852.

limited exception to the pension plan anti-alienation provision"). Without this provision, if a plan paid benefits to an ex-spouse, the plan would violate ERISA's anti-alienation provision. IRC § 401(a)(13), 26 U.S.C. § 401(a)(13). This provision is essential to one of REA's central purposes, which is to give enhanced protection to a participant's spouse and dependent children in the event of divorce or separation.

Prior to the passage of REA, the courts were divided as to whether ERISA's anti-alienation provision prevented women from acquiring a portion of their husbands' retirement assets upon divorce, even if the ex-husband had assented and a state court had awarded them. *See* H.R. REP. NO. 98-655, pt. 1, at 30 (1984) (noting the division of state courts on this question); *Potential Inequities Affecting Women: Hearings Before the Senate Comm. on Finance*, 98th CONG. 235 (Part II) (1988) (statement of Patricia Kelly, President and Co-founder, KINDER). In order to settle the split in the federal common law that was developing, Congress stepped in to close the gaps in the statute and expressly address these issues. *Cf. Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987) (courts may develop federal common law only where ERISA does not expressly address the issue before the court). Because ERISA sets forth definitive procedures as to how to become a beneficiary when couples divorce, there is no need to develop federal common law in this area. Indeed, such development would create additional exceptions to the anti-alienation provision in derogation of the statute. *See Guidry v. Sheet Metal Workers Nat'l Pension Fund,* 493 U.S.

365, 376 (1990).

Congress expressly enacted QDROs to"allow[ ] courts to recognize a nonparticipant spouse's . . . interest in pension plans . . ." providing that the QDRO's requirements are met, *id.,* and made them "part of the statute's mandatory participation and vesting requirements." *Boggs,* 520 U.S. at 841. If a domestic relations order recognizes a "spouse, former spouse, child, or other dependent of a participant" as having a right to receive benefits payable under a plan with respect to a participant, they are considered an "alternate payee." ERISA § 206(d)(3)(K), 29 U.S.C. § 1056(d)(3)(K). If the domestic relations order is found to be qualified, then the alternate payee is considered a beneficiary under the plan. ERISA § 206(d)(3)(J), 29 U.S.C. § 1056(d)(3)(J). As a beneficiary, the plan may pay benefits directly to a "spouse, former spouse, child, or other dependent of a participant."

3. A group health plan must provide health benefits to a child if the plan receives a qualified medical child support order.

Finally, ERISA requires group health plans to recognize qualified medical child support orders (QMCSOs) issued by state courts requiring a participant-parent to provide health care coverage through a plan. ERISA § 609(a)(1), 29 U.S.C. § 1169(a)(1). Under a QMCSO, the child is considered a beneficiary under the participant's plan and is eligible to receive health benefits under that plan.

ERISA § 609(a)(7), 29 U.S.C. § 1169(a)(7).

C. ERISA Identifies Those Persons Who May Receive Benefits Under a Plan.

In order to obtain benefits under an ERISA covered plan, a participant or beneficiary must comply with Congress' scheme setting forth in great detail the "who, what, when and how." *See generally, Shaw.*, 463 U.S. at 91 (noting that ERISA imposes "participation, funding and vesting requirements" on pension plans along with "various uniform standards" for every plan including rules concerning "reporting, disclosure and fiduciary responsibility" for every plan); *Boggs*, 520 U.S. at 841 ("surviving spouse annuity and QDRO [qualified domestic relations order] provisions . . . are part of the statute's mandatory participation and vesting requirements.").

As part of its benefit scheme, ERISA limits the persons who may receive benefits under a plan to either a participant or beneficiary. A participant is defined as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan. . . ." ERISA § 3(7), 29 U.S.C. § 1002(7). A beneficiary is defined as either "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become eligible to a benefit thereunder." ERISA § 3(8), 29 U.S.C. § 1002(8).

Apart from the mandated plan provisions,

ERISA itself does not confer the right to receive benefits on a nonparticipant. Accordingly, unless a nonparticipant meets the criteria under the plan's provisions to be considered a beneficiary, the nonparticipant has no rights under the plan to receive benefits. ERISA's silence with respect to the right of a nonparticipant to receive plan benefits, other than by following the plan terms, provides powerful support for the conclusion that such a right does not exist. *Boggs*, 520 U.S. at 846-48. Instead, it provides compelling support for the contrary proposition – that the only means by which a nonparticipant can receive a benefit is through the specific provisions of the plan. The Court has adamantly refused to create new classes of persons for whom plan assets are to be administered, *Boggs*, 520 U.S. at 850; *Guidry,* 493 U.S. at 376, and it should not do so here.

D. Because the Executrix of Mr. Kennedy's Estate Is Neither a Participant Nor a Beneficiary under the Terms of the Dupont Savings Plan, She Is Not Entitled to Receive a Benefit under the Plan.

It is quite apparent that the executrix of Mr. Kennedy's estate does not meet the definition of a beneficiary or participant under the DuPont Savings plan. Nor does she fall into any of the plan provisions mandated by ERISA which are included in the DuPont Savings Plan. Accordingly, she has no rights under the statute or the plan to receive benefits.

This case would not be before the Court if Mr.

Kennedy had updated his designation of beneficiary form, which he clearly had ample time and opportunity to do, or if the QDRO had referenced the Dupont Savings Plan and the ex-spouse's waiver.[4] The participant had the means and control to effectuate his intent. Although the divorce decree indicated the parties' intent at the time of the decree, a plan should not have to guess whether the parties' intentions have changed since the divorce decree or whether the parties merely forgot to update the beneficiary designation in the plan. Instead, if the plan provisions are explicit, and participants are given notice of the provisions, as required under the statute, participants can be assured that their choices are followed. This perspective places direct responsibility upon participants to review their beneficiary designations when they experience a life change such as marriage, divorce or widowhood, and to follow the terms of their plan to make any changes, as they see fit.

The necessity of reviewing and changing beneficiary designations after a divorce is not a secret known only by those who toil in the minefields of ERISA. A search of the Internet results in numerous articles discussing this issue in both the mainstream

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[4] Although the QDRO could have referenced the Savings Plan and stated that the then-Mrs. Kennedy waived any right to benefits under the Savings Plan, it was not necessary to do so. Instead, it would have been sufficient for Mr. Kennedy just to follow the plan rules and change the beneficiary designation. Requiring the parties to obtain a QDRO in similar cases would be unnecessarily expensive and waste judicial resources.

press,[5] and in legal periodicals focused on family law issues.[6] With such clear warnings to both individuals and counsel, the courts should not develop a whole new structure to take care of the mistakes or forgetfulness of a few. There is no need to embroil ERISA plans in litigation, diminish plan assets to resolve these issues and siphon plan assets that could pay for better benefits.

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[5] *E.g.*, Kathy Kristof, *Estate Planning Can Help You Rest Easier*, LOS ANGELES TIMES, Oct. 28, 2007, *available at* 2007 WLNR 21231817 (cautioning individuals to keep beneficiary designations up to date); KIPLINGER, *Tie Up Loose Ends if You Untie the Knot* (May 1, 2007); Sandra Block, *Divorce Doesn't Mean Your ex Is No Longer Your Beneficiary*, USA TODAY, Sept. 6, 2004, *available at* http://www.usatoday.com/money/perfi /columnis/block/2004-09-06-block_x.htm.(urging individuals to check all accounts and change beneficiary designations); Sam Ali, *Lives Change: Update your beneficiary*, Star-Ledger, Aug. 3, 2003; Kaja Whitehouse, *Beneficiary-Designation Form Is Key to Passing on Your Assets*, WALL ST. J. at D-3, June 4, 2002.

[6] *E.g.*, Sharon Corbitt, *A Closing Gift for Your Client*, 29 FALL FAM. ADVOC. 45 (Fall 2006) (suggesting sending a closing letter to the client after the court signs the divorce order specifically stating that all beneficiary designations on any retirement benefits, life insurance, banks accounts should be changed to be "consistent with your wishes as a single person."); Stewart W. Gagnon,, *et al.*, *Pensions, Retirements Benefits, and Deferred Compensation*, 2 TEX. PRAC. GUIDE FAMILY LAW § 8:50 (Nov. 2007) ("Practice Tip [after the Court's decision in *Egelhoff*]: Be Sure to advise your client in writing of the immediate need to file a change of beneficiary form with the plan administrator of his or her ERISA insurance policy or other benefit plan."); American Bar Association, *Closing & Post-judgment*, 30 WTR FAM. ADVOC. 46 (Winter 2008) (suggesting that at the conclusion of divorce proceedings, counsel send the client a letter to check beneficiary designations on any retirement accounts and life insurance policies).

The Plan also could have resolved this matter and protected itself if it had more detailed plan provisions. 29 U.S.C. § 1104(a)(1)(D) (plan trustees or fiduciaries are required under ERISA to discharge their duties "in accordance with the documents and instruments governing the plan."); *Curtiss-Wright*, 514 U.S. at 81 (recognizing that plan administrators must follow plan documents). AARP notes that, as a matter of best practices, some plans have amended their terms to address the numerous beneficiary designation issues that may arise. *Cf., e.g., Herzberger v. Standard Ins. Co.,* 205 F.3d 327, 332 (7th Cir. 2000) (Judge Posner suggesting specific language which the circuit will find to confer discretion upon plans in determining eligibility for ERISA plan benefits). Some plans have included language automatically revoking all beneficiary designations upon divorce, similar to that of the Washington statute in *Egelhoff*. Some plans have adopted provisions such as:

> The divorce of the Participant and designated Beneficiary does not invalidate the beneficiary designation; the Participant must submit a change of Beneficiary designation to the Fund to remove the former spouse as a Beneficiary.

Others have stated that the plan must receive the beneficiary designation in order for the designation to be valid, and benefits will only be paid in accordance with the most recently designated Beneficiary form filed with the plan. Other plans go so far as to specify

default beneficiaries where there is no designated beneficiary and to describe precisely how payments will be made to beneficiaries who are minors. In any case, it becomes a matter of plan design, *see Black & Decker Disability Plan v. Nord*, 538 U.S. at 833; *cf. Rush Prudential HMO v. Moran*, 536 U.S. at 386, not a court's determination of fairness in a particular situation.

Such language would enable plans to establish finality concerning payment of employee benefits; prevent plans from becoming embroiled in state probate, domestic relations and other actions, thus minimizing litigation and administrative costs; and reduce the number of plans filing interpleader actions to request court determinations concerning to whom payment must be made. *See, e.g., Stickney v. Muhlenberg Coll. TIAA-CREF Ret. Plan*, 896 F. Supp. 412 (E.D. Pa. 1995). Such language would also inform participants, beneficiaries and their counsel of the plan's procedures and requirements so that they know what actions they must take, when dividing marital assets, to ensure that their intentions with respect to plan benefits will be followed.

AARP does not mean to suggest that the most probable intent of Mr. Kennedy was to designate his estate rather than his ex-spouse as his beneficiary, and that it was by mere oversight, carelessness, or lack of knowledge, that he failed to change his beneficiary designation. Nor do we suggest that these situations are uncommon. What we urge is that requiring plan administrators to use monies belonging to other participants to investigate and resolve a deceased

participant's "true intentions," and, no matter the resolution, spend more of those other participant's monies to then litigate the same question, places the burden of the participant's mistake in the wrong place. Instead, the estate should be seeking a remedy in state court by seeking to enforce the waiver and requiring the former Mrs. Kennedy to surrender other assets, if she indeed was the improper beneficiary of the plan's distribution.

CONCLUSION

For the foregoing reasons, AARP urges the Court to affirm the decision of the United States Fifth Circuit Court of Appeals.

May 9, 2008 Respectfully submitted,

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