American Bar Association
www.supremecourtpreview.org

No. 07-636

In The
Supreme Court of the United States

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, DECEASED,

Petitioner,

versus

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

PETITIONER'S REPLY BRIEF ON THE MERITS

STACY L. KELLY
Counsel of Record
1925 Lexington Street
Houston, Texas 77098
(713) 408-8134
(832) 533-2274 (fax)
slkesq55@comcast.net

DAVID A. FURLOW
KEVIN PENNELL
MORGAN GASKIN
THOMPSON & KNIGHT LLP
333 Clay Street, Suite 3300
Houston, Texas 77002
(713) 654-8111
(832) 397-8253 (fax)
david.furlow@tklaw.com

Attorneys for Petitioner Kari Ellen Kennedy

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Was the Fifth Circuit correct in concluding that ERISA's Qualified Domestic Relations Order provision, 29 U.S.C. § 1056(d)(3)(B)(i), is the only valid way a divorcing spouse can waive her right to receive her ex-husband's pension benefits?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	vi
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. Congress did not bar divorcing spouses from enforcing attorney-negotiated, court-approved, voluntary waivers of pension benefits	2
A. ERISA's anti-spendthrift statute does not bar court-approved voluntary waivers of pension benefits enforceable under federal common law	2
B. ERISA's QDRO provision does not bar non-QDRO waivers of ERISA benefits enforceable under federal common law	5
1. The QDRO statute applies only to "alternate payee" domestic relations "orders" enforcing state laws, not voluntary settlements	5
2. REA's legislative history reflects Congress' intent to regulate transfers of pension benefits to alternate payees under alimony, spousal maintenance, child support, and community property laws, not to end voluntary waivers	7

TABLE OF CONTENTS – Continued

Page

3. A QDRO safe harbor for alternate-payee orders does not preclude divorcing spouses from voluntarily settling marital disputes 8

4. The Treasury Department's interpretation of 26 C.F.R. § 1.401(a)-13(c)(1)(ii) is entitled to deference ... 10

II. The Fifth Circuit erred in holding that ERISA's QDRO provision is the *only* way a divorcing spouse can waive an ex-spouse's pension benefits 14

A. The Estate was a proper beneficiary of William Kennedy's pension benefits 14

B. William Kennedy revoked "any and all" prior beneficiary designations in favor of ex-spouse Liv on June 7, 2004, four days *after* his divorce 16

C. Given her use of a QDRO to protect her interest in part of William Kennedy's DuPont benefits, ex-wife Kennedy's waiver of pension proceeds did not violate ERISA 18

D. A flexible federal common law analysis ensures justice and fulfills the reasonable expectations of plan participants, heirs, and beneficiaries 19

TABLE OF CONTENTS – Continued

Page

III. Enforcing voluntary waivers of ERISA benefits under federal common law will not materially increase the burdens of ERISA plan administrators 20

A. This Court Declined to Grant Petitioner's Issue #2, concerning the "Plan Documents" rule, so DuPont's efforts to argue a "Plan Documents" defense fall outside the proper scope of this appeal 20

B. *If* the "Plan Documents" defense is before this Court, the government's opinions about it do not command deference 21

C. *If* the "Plan Documents" defense is before this Court, neither ERISA nor DuPont defined beneficiary-designations as plan documents..................................... 23

D. The "Plan Documents" defense rewrites ERISA's plain statutory language 26

E. The enforcement of voluntary divorce-decree waivers will not materially increase the burdens of ERISA plan administrators 27

1. This case arose only because DuPont paid William Kennedy's SIP funds without regard for the Estate after ignoring repeated pleas to recognize that Liv waived her rights.... 27

TABLE OF CONTENTS – Continued

Page

2. Administrators already have to investigate divorce decrees, QDROs, QPSAs, QJSAs, and other documents, so enforcement of voluntary waivers will not materially increase plan expenses 28

3. Interpleaders enable administrators to recover plan attorneys' fees 31

F. A state court suit against Liv Kennedy would have been pointless 33

CONCLUSION 35

TABLE OF AUTHORITIES

Page

Auer v. Robbins, 519 U.S. 452 (1997)........................10

Beck v. Pace International Union, ___ U. S. ___, 127 S.Ct. 2310 (2007)...4

Boeing Co. v. United States, 537 U.S. 437 (2003)...11

Boggs v. Boggs, 520 U.S. 833 (1997) 3, 4, 13, 14

Brandon v. Travelers Ins. Co., 18 F.3d 1321 (5th Cir. 1994), *cert. denied*, 513 U.S. 1081 (1995)..18, 19

Brown v. O'Keefe, 300 U.S. 598 (1937).......................13

Cheney v. Libby, 134 U.S. 68 (1890)..........................34

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 22

Chiles v. Ceridian Corp, 95 F.3d 1505 (10th Cir. 1996)...17

Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) 25

Egelhoff v. Egelhoff, 532 U.S. 141 (2001)..............3, 19

Estate of Altobelli v. IBM, 77 F.3d 78 (4th Cir. 1996)...28

Firefighters v. Cleveland, 478 U.S. 501 (1986)...........6

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989)...2, 19

TABLE OF AUTHORITIES – Continued

Page

First Trust Corp. v. Bryant, 410 F.3d 842 (6th Cir. 2005) 33

Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir. 1990) (*en banc*), *cert. denied*, 498 U.S. 820 (1990) 4, 6, 13, 28

Gallagher v. Reliance Standard Life Ins. Co., 305 F.3d 264 (4th Cir. 2002) 17

Gonzalez v. Oregon, 546 U.S. 243 (2006) 22

Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990) 15, 16

Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238 (2000) 4

Hughes Salaried Retirees v. Administrator of Hughes, 72 F.3d 686 (9th Cir. 1995) (*en banc*), *cert. denied,* 517 U.S. 1189 (1996) 24, 25

Jicarilla Apache Tribe v. FERC, 578 F.2d 289 (10th Cir. 1978) 21

Kerrigan v. Comm'r of Public Health, No. SC No. 17716 (Ct., argued May 14, 2007)....................30

Lee v. Blue Cross/Blue Shield of Alab., 10 F.3d 1547 (11th Cir. 1994)....................17

Long Island Care at Home, Ltd. v. Coke, ___ U.S. ___, 127 S.Ct. 2339 (2007) 10

Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986)....................9

TABLE OF AUTHORITIES – Continued

Page

McElroy v. SmithKline Beecham Health & Welfare Benefits Trust Plan for U.S. Employees, 340 F.3d 139 (3d Cir. 2003) 23

McGowan v. NJR Service Corp., 423 F.3d 241 (3d Cir. 2005), *cert. denied*, ___ U.S. ___, 127 S.Ct. 1118, 166 L. Ed. 2d 906 (2007) ....*passim*

In re Marriage Cases, No. S147999 *et al.,* 43 Cal. 4th 757, 183 P.3d 384 (Cal. 2008) 30

Martinez v. Cty. of Monroe, 2008 NY Slip Op. 909, 50 A.D.3d 189, 850 N.Y.S.2d 740 (N.Y. 2008) (not published) 30

Metropolitan Life Ins. Co. v. Wheaton, 42 F.3d 1080 (7th Cir. 1994) 29

Miller v. Monumental Life Ins. Co., 502 F.3d 1245 (10th Cir. 2007) 17, 18

Opinions of Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) 30

Perez v. Aetna Life Ins. Co., 150 F.3d 550 (6th Cir. 1998) (*en banc*) 17

Philips v. Lincoln Nat'l Life Ins. Co., 978 F.2d 302 (7th Cir. 1992) 17

Rhoades v. Casey, 196 F.3d 592 (5th Cir. 1999), *rhg. & rhg. en banc denied,* 209 F.3d 721 (5th Cir. 2000), *cert. denied,* 531 U.S. 924 (2000)..........32

Stobnicki v. Textron, Inc., 868 F.2d 1460 (5th Cir. 1989)..6, 18, 19, 31

Todd v. AIG Life Ins. Co., 47 F.3d 1448 (5th Cir. 1995)..17

TABLE OF AUTHORITIES – Continued

Page

Tolstad v. Tolstad, 527 N.W.2d 668 (N.D. 1995)........29

Trustees of Directors Guild of America-Producer Pension Benefits Plans v. Tise, 234 F.3d 415 (9th Cir. 2000) 32

United States v. Mead Corporation, 533 U.S. 218 (2001)..22

STATE CASES

Keen v. Weaver, 121 S.W.3d 721 (Tex. 2003), *cert. denied*, 540 U.S. 1047 (2003)..........................11

State Farm Life Ins. Co. v. Martinez, 216 S.W.3d 799 (Tex. 2007)..32

FEDERAL STATUTES

1 U.S.C. § 7 30

5 U.S.C. § 706(2)..22

15 U.S.C. § 77n 2

15 U.S.C. § 77z-2 9

15 U.S.C. § 78bb 2

28 U.S.C. § 1738C..30

28 U.S.C. § 2361 32

Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq*. 24

29 U.S.C. §1001(a) 24

29 U.S.C. § 1002 24

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. § 1002(8) 14
29 U.S.C. § 1002(13) 10
29 U.S.C. § 1022 24
29 U.S.C. § 1023 24
29 U.S.C. § 1024 24
29 U.S.C. § 1024(b)(4) 24, 25
29 U.S.C. § 1025 24
29 U.S.C. § 1055(a) 8
29 U.S.C. § 1055(b)(1)(A) 8
29 U.S.C. § 1055(b)(1)(C) 8
29 U.S.C. § 1055(b)(1)(C)(i) 8
29 U.S.C. § 1055(c)(2) 9
29 U.S.C. § 1055(c)(2)(A) 8
29 U.S.C. § 1055(c)(3) 8
29 U.S.C. § 1056 6
29 U.S.C. § 1056(d)(1) 3
29 U.S.C. § 1056(d)(2) 9
29 U.S.C. § 1056(d)(3) 10
29 U.S.C. § 1056(d)(3)(A) 5
29 U.S.C. § 1056(d)(3)(B)(i)(I) 5
29 U.S.C. § 1056(d)(3)(B)(ii)(II) 6
29 U.S.C. § 1056(d)(3)(G)(I) 7
29 U.S.C. § 1056(d)(3)(G)(II) 7

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. § 1056(d)(3)(H)(ii)....................................5
29 U.S.C. § 1056(d)(3)(H)(iii) 5
29 U.S.C. § 1056(d)(3)(N) 10
29 U.S.C. § 1102...26
29 U.S.C. § 1102(a)(1)..23
29 U.S.C. § 1102(b) 23
29 U.S.C. § 1104...19, 26, 30
29 U.S.C. § 1104(a)(1)..19
29 U.S.C. § 1104(a)(1)(D)...................................23, 26
29 U.S.C. § 1132(g)(1)..33
29 U.S.C. § 1135...10
29 U.S.C. § 1136(b) 10
29 U.S.C. § 1144(a) 3
29 U.S.C. 1144(d)..3, 12
Internal Revenue Code § 408...................................11
Internal Revenue Code § 691...................................11
Internal Revenue Code § 2518(b).............................11

FEDERAL REGULATIONS

Reorganization Plan No. 4 of 1978, § 101(a), 3 C.F.R. § 332 10
26 C.F.R. § 1.401(a)-13(c)(1)(ii)..........................10, 11
26 C.F.R. § 1.401(a)-20 8

TABLE OF AUTHORITIES – Continued

Page

26 C.F.R. § 1.401(a)(9)-4 11

26 C.F.R. § 1.417(a)(3)-1 8

26 C.F.R. § 2518 11

29 C.F.R. § 2509.96-1 9

29 C.F.R. § 2510.3-1(j) 9

FEDERAL RULES

FED. R. CIV. P. 4(d) 2

FED. R. CIV. P. 12(a)(1)(A)(2) 2

SUP. CT. R. 15.5 2

SUP. CT. R. 17.5 2

STATE STATUTES

CONN. GEN. STAT. § 46b-38nn (2006) 30

D.C. LAW 16-79 (Act 16-265) (2006) 30

HAW. REV. STAT. § 572C-2 (1997) 30

2004 ME. LEGIS. SERV. CH. 672 (H.P. 1152; L.D. 1579) 30

2001 ME. LEGIS. SERV. CH. 347 (H.P. 1256; L.D. 1703) 30

N.H. REV. STAT. ANN. § 457-A (2007) 30

N.J. STAT. ANN. § 37:1-29 (2006) 30

OR. LAWS CH. 99 (2007) 30

TABLE OF AUTHORITIES – Continued

Page

15 VT. STAT. ANN. § 1201 (1999) 30

WASH. REV. CODE CH. 26.60 (2006) 30

SCHOLARLY AUTHORITIES

26 C.F.R. § 1.401(a)(9)-4, Q&A 4 11

Black's Law Dictionary (4th ed. 1968)...................3, 12

Comment, *Who Is the Payee, Part VIII: Altobelli v. IBM and the Other Beneficiary Waiver Cases,* 14 ERISA LITIG. REPTR. 16 (Aug. 1996)...................31

Dorsaneo, William V., TEXAS LITIGATION GUIDE § 22 (Matthew Bender 2008) 32

Editor, Employee Benefits Institute of America's EBIA WEEKLY, http://www.ebia.com/Weekly Archives/401k/CourtCases/16275 (07/27/2008).......32

Gorris, Jeffrey, *Waivers of ERISA Plan Benefits*: *Preventing Judicial Interpretations of a Complex Statute from Frustrating the Statute's Simple Purpose*, 155 U. PA. L. REV. 717 (2007)..10, 27, 31

Internal Revenue Service General Counsel Memorandum 39,858, 1991 WL 776304 (Sept. 23, 1991) 11

Medill, Colleen E., *The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality*, 49 EMORY L.J. 1 (Winter 2000) 9

TABLE OF AUTHORITIES – Continued

Page

NATIONAL CONFERENCE OF STATE LEGISLATURES, *Common Law Marriage*, at http://www.ncsl.org/programs/cyf/commonlaw.htm (07/28/08) 29

RESTATEMENT (SECOND) OF TRUSTS § 36, cmt. c at 100 (AM. L. INST. 1959) 4

RESTATEMENT (THIRD) OF TRUSTS § 58(1) (AM. L. INST. 2003) 4

3 SCOTT & ASCHER ON TRUSTS § 15.2.9 (5th ed. 2007) 4

Snyder, Timothy J., *Supreme Court rules that ERISA preempts state laws on beneficiary designations,* DELAWARE EMPLOYMENT LAW LETTER (June 4, 2001) 31

Webster's New International Dictionary (2d ed. 1958) 3

Webster's Third New International Dictionary (Merriam-Webster 1993) 12

7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE § 1719 (1986) 32

LEGISLATIVE HISTORY

S. REP. NO. 575, 98th Cong., 2d Sess. 19, reprinted in 1984 U.S.C.C.A.N. 2547 (1984) 7

SUMMARY OF ARGUMENT

The Kennedy Estate petitions this Court to reverse and render the Fifth Circuit's decision to invalidate ex-wife Kennedy's voluntary, attorney-negotiated, court-approved waiver of pension benefits. When Congress enacted ERISA's anti-alienation and QDRO provisions, it did not bar divorcing spouses from executing voluntary waivers of pension benefits in property settlements. Waivers are not assignments or alienations. And a QDRO is *a* safe-harbor, but not the only haven, available to spouses dividing marital property.

DuPont's "Plan Documents" defense exceeds the scope of this Court's *certiorari* grant. The Fifth Circuit's opinion focuses on QDROs, not "Plan Documents." This Court denied Issue #2 concerning "Plan Documents" and granted review on Issue #3 about QDROs. *If* DuPont's "Plan Documents" defense is before this Court, it rewrites ERISA. Neither ERISA nor DuPont's SIP defines beneficiary designations as plan documents, so judicial recognition of it would deny participants and beneficiaries notice of a doctrine that unfairly denies them benefits.

Enforcement of voluntary waivers will not materially increase the burdens of ERISA plan administrators. No administrator needs to keep track of divorces because waiver issues will only arise when an executor makes a plan administrator aware of a claim before payout. Beneficiaries usually resolve these disputes without litigation. When rival claimants

cannot resolve their differences, courts should render justice rather than reward injustice. In proper and efficiently-litigated interpleader actions, administrators can recover reasonable and necessary fees and minimize expenses.

ARGUMENT

I. Congress did not bar divorcing spouses from enforcing attorney-negotiated, court-approved, voluntary waivers of pension benefits.

A. ERISA's anti-spendthrift statute does not bar court-approved voluntary waivers of pension benefits enforceable under federal common law.

As this Court held in *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 110 (1989), ERISA creates a federal common law of employee benefits. This Court applies traditional common law rule that any federal right can be waived. *See*, *e.g.*, FED. R. CIV. P. 4(d); 12(a)(1)(A)(2); SUP. CT. R. 15.5, 17.5.

Congress elected *not* to preclude divorcing spouses from executing voluntary, court-approved waivers of pension benefits when it enacted ERISA. If Congress had opposed voluntary pension waivers, it could have barred such waivers. The Securities Act of 1933 and the Securities Exchange Act of 1934 expressly declare waivers to be void, 15 U.S.C. § 77n and § 78bb, but ERISA contains no similar bar.

ERISA pre-empts state law at 29 U.S.C. § 1144(a) but preserves federal law at 29 U.S.C. § 1144(d).

Neither *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) nor *Boggs v. Boggs,* 520 U.S. 833 (1997) supports DuPont's refusal to recognize voluntary waivers. In *Egelhoff,* this Court struck down a state statute that revoked every beneficiary-designation at divorce. In *Boggs,* this Court considered whether ERISA pre-empts a statute allowing a non-participant spouse to "transfer by testamentary instrument an interest" in pension benefits, 520 U.S. at 835-36. This case does not concern a statute or a transfer but a waiver.

ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1), states that, "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." It bars assignments and alienations, not waivers. Ex-spouse Liv's waiver was neither an alienation nor an assignment. *McGowan v. NJR Service Corp.*, 423 F.3d 241, 248 (3d Cir. 2005), *cert. denied*, ___ U.S. ___, 127 S.Ct. 1118, 166 L. Ed. 2d 906 (2007) (Fuentes, J., dissenting).

In its brief at 6, the United States quotes pre-ERISA definitions of "assignment" and "alienation." *See Black's Law Dictionary* at 96 ("alienate") and 152 ("assign") (4th ed. 1968); *accord Webster's New International Dictionary* 65 ("alienate") and 166 ("assign") (2d ed. 1958). Those definitions show that Congress understood assignments and alienations to involve transfers and conveyances when it enacted and amended ERISA. A beneficiary does not transfer or

convey pension benefits, and thus does not assign or alienate them, by waiving, disclaiming, or renouncing them. *McGowan*, 423 F.3d at 248; *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown*, 897 F.2d 275, 279 (7th Cir. 1990) (*en banc*).

The distinction between a waiver and an assignment or alienation is rooted in the common law of trusts, "ERISA's backdrop," *Beck v. Pace International Union*, ___ U.S. ___, 127 S.Ct. 2310, 2316 (2007) and "a starting point" for interpreting the statute, *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250 (2000). ERISA's prohibition is analogous to trust law spendthrift provisions. *Boggs*, 520 U.S. at 852. A beneficiary of a spendthrift trust can waive an interest. RESTATEMENT (THIRD) OF TRUSTS § 58(1) cmt. c at 359 (2003); RESTATEMENT (SECOND) OF TRUSTS § 36, cmt. c at 100 (1959); 3 SCOTT & ASCHER ON TRUSTS § 15.2.9, at 933-934 (5th ed. 2007). Ex-spouse Liv did not accept William's SIP benefits before her divorce and could not direct who received them afterwards, so she did not violate ERISA's spendthrift provisions.

B. ERISA's QDRO provision does not bar non-QDRO waivers of ERISA benefits enforceable under federal common law.

1. The QDRO statute applies only to "alternate payee" domestic relations "orders" enforcing state laws, not voluntary settlements.

The QDRO statute shows that Congress was concerned with orders that "create[ ] or recognize[ ] 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." 29 U.S.C. § 1056(d)(3)(B)(i)(I) (emphasis added). Although 29 U.S.C. § 1056(d)(3)(A)'s QDRO spendthrift law applies "to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order," Congress did not use "creation" and "recognition" to expand the bar against "assignment" and "alienation" beyond the ordinary meaning the Treasury Department gives those terms.

DuPont argues that 29 U.S.C. § 1056(d)(3)(H)(iii) compels a plan-administrator who receives a non-qualified domestic relations order to pay benefits as if there had been no such order. The statute states that an administrator "shall pay [benefits] to the person or persons who would have been entitled to such amounts as if there had been no such order. . . ." DuPont contrasts 29 U.S.C. § 1056(d)(3)(H)(ii), which states that an administrator must not pay someone who has presented a plan with a non-qualified

domestic relations order. But the statute applies comprehensively to "alternate payee" transfers.

The statute specifically targets court "orders" transferring property to alternate payees, not waivers in *voluntary settlement agreements*. Nothing in 29 U.S.C. § 1056 bars administrators from recognizing waivers. The Fifth Circuit has held that "a controversy between good-faith adverse claimants to pension plan benefits is subject to settlement like any other . . ." *Stobnicki v. Textron, Inc.*, 868 F.2d 1460, 1465 (5th Cir. 1989). Judge Easterbrook also concluded that voluntary settlement agreements do not violate the QDRO law:

> Matrimonial law does not require one or another disposition of property in an uncontested divorce. . . . The state court's approval of the private settlement is like a consent decree, which should be treated like a contract. . . . Consent decrees do not alter the legal obligations of strangers (here, of the Fund to enforce its written-designation rule).

Fox Valley, 897 F.2d at 282 (J. Easterbrook, dissenting), citing *Firefighters v. Cleveland,* 478 U.S. 501, 517-23 (1986). The QDRO statute governs orders enforceable under "a state domestic relations *law*," 29 U.S.C. § 1056(d)(3)(B)(ii)(II), not voluntary waivers. (Emphasis supplied).

2. REA's legislative history reflects Congress' intent to regulate transfers of pension benefits to alternate payees under alimony, spousal maintenance, child support, and community property laws, not to end voluntary waivers.

As the United States observes, "[t]he legislative history of the QDRO provision confirms the point" that REA regulates transfers of pension benefits to alternate payee transferees." Senate Report No. 575, 98th Cong., 2d Sess. 19 (1984) states that, "if a domestic relations order requires the distribution of all or a part of a participant's benefits under a qualified plan *to an alternate payee*," then the creation, recognition, or assignment of the "alternate payee's" right to benefits is not an assignment or alienation if and only if the order is a qualified domestic relations order. The statute only regulates "alternate payee" domestic relations orders requiring transfers to dependents under a "state domestic relations law (including community property law)" governing child support, alimony, post-marital maintenance, and divisions under community property laws. *See*, *e.g.*, 29 U.S.C. § 1056(d)(3)(G)(I) and (II). But it does not restrict voluntary waivers. The Kennedy divorce did not involve child support, an "alternate payee," or a court order pursuant to a state alimony, child-support, or court-decreed asset-division law. The QDRO statute does not apply to ex-spouse Liv's waiver.

3. A QDRO safe harbor for alternate-payee orders does not preclude divorcing spouses from voluntarily settling marital disputes.

Congress intended QDROs to serve as *one* exception to ERISA's prohibition on assignment of benefits to satisfy his or her family support obligations. *See* S. REP. NO. 575, at 18-19, *reprinted in* 1984 U.S.C.C.A.N. 2547 and 2564-65 (1984). As the United States notes in its brief at 13-14, Congress gave spouses a right to receive a survivor's annuity when those pension benefits are paid as an annuity. *See* 29 U.S.C. §§ 1055(a), (b)(1)(A), and (B). When the plan is not required to provide an annuity form, the participant does not elect to receive a life annuity, and other conditions are met, a surviving spouse has a right to receive the balance of the account on the participant's death. *See* 29 U.S.C. § 1055(b)(1)(C).

A participant can waive the survivor form of benefit, or designate a beneficiary other than the spouse to receive the balance of the participant's individual account, only if a spouse consents in writing. 29 U.S.C. §§ 1055(b)(1)(C)(i), (c)(2)(A) and (c)(3); 26 C.F.R. §§ 1.401(a)-20, 1.417(a)(3)-1. Absent a QDRO, REA's amendments do not restrict a plan-participant's power to waive the survivor benefit or to designate an alternate beneficiary with respect to an ex-spouse. Congress did not end waivers that become effective on divorce, for it expressly authorized participants to deny ex-spouses pension benefits and to agree to waivers of survivor benefits.

While Congress permitted non-participant spouses to approve a participant spouse's designation of a different beneficiary and to permit a participant spouse to make designations free from any requirement of further spousal consent under 29 U.S.C. § 1055(c)(2), it did not provide an exception to the anti-alienation provision, as it did for transfers to third-party alternative payees. Construing ERISA to prohibit spouses from relinquishing interests in pension benefits conflicts with important elements of the statutory scheme. *See Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986).

Just as the aldermen of Boston have created a safe harbor without stopping anyone from anchoring at Marblehead, the QDRO is not ERISA's only harbor. *See* 29 U.S.C. § 1056(d)(2) (certain loans and voluntary, revocable assignments are not ERISA alienations and assignments). ERISA contains other sheltered havens, too. Department of Labor Interpretive Bulletin 96-1, codified at 29 C.F.R. § 2509.96-1 (1999); Colleen E. Medill, *The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality*, 49 EMORY L.J. 1, 51 (Winter 2000). An employer can offer non-ERISA 403(b) programs to employees while sheltering from ERISA's Title I requirements. 29 C.F.R. § 2510.3-1(j). When Congress amended the Securities Act of 1933 to create a safe harbor for forward-looking statements about securities, it did not bar or limit traditional laches, limitations, and release defenses. *See* 15 U.S.C. § 77z-2. In creating QDROs, Congress did not

bar or limit voluntary waivers. *See* Jeffrey Gorris, *Waivers of ERISA Plan Benefits*: *Preventing Judicial Interpretations of a Complex Statute from Frustrating the Statute's Simple Purpose*, 155 U. PA. L. REV. 717, 741-42 (2007).

4. The Treasury Department's interpretation of 26 C.F.R. § 1.401(a)-13(c)(1)(ii) is entitled to deference.

The United States' interpretation of ERISA's spendthrift statute reconciles the Treasury and Labor Departments' interpretations of "alienations" and "assignments" in 26 C.F.R. § 1.401(a)-13(c)(1)(ii) and is entitled to great deference. Those Secretaries determine whether a voluntary waiver should be understood as an "assignment" or "alienation" under ERISA's QDRO provision. *Cf. Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339, 2349 (2007) (deference); *Auer v. Robbins*, 519 U.S. 452, 462 (1997). Congress granted Labor rule-making and enforcement authority under ERISA, *e.g.,* 29 U.S.C. §§ 1002(13), 1135, and 1136(b). That includes express authority to construe the QDRO provision, 29 U.S.C. § 1056(d)(3), in consultation with Treasury under 29 U.S.C. § 1056(d)(3)(N). Treasury also has authority to construe the anti-alienation provision. *See* Reorganization Plan No. 4 of 1978, § 101(a), 3 C.F.R. § 332 (1979).

Treasury's reasonable interpretation of a statute it enforces merits great deference. *See Long Island*

Care at Home, ___ U.S. ___, 127 S.Ct. at 2350-2351; *Boeing Co. v. United States*, 537 U.S. 437, 448 (2003). Labor's interpretation evolved between its *amicus* filing in *Keen v. Weaver*, 121 S.W.3d 721 (Tex. 2003), *cert. denied*, 540 U.S. 1047 (2003), and its *amicus* filing here. The Secretaries of Labor and the Treasury have harmonized their analyses so that no assignment or alienation occurs if a beneficiary waives rights without transferring them.

DuPont's analysis would wreak havoc on the Treasury's ability to enforce ERISA's anti-spendthrift provisions and Treasury's acceptance of benefit disclaimers under Sections 408, 691, and 2518(b) of the Internal Revenue Code, regulations, and state law. *See, e.g.,* General Counsel Memorandum 39,858, 1991 WL 776304 (Sept. 23, 1991); 26 C.F.R. § 2518; and 26 C.F.R. § 1.401(a)(9)-4, Q&A 4. Treasury's regulation, 26 C.F.R. § 1.401(a)-13(c)(1)(ii) ("Assignment or alienation of benefits"), reads in pertinent part as follows:

> (c) *Definition of assignment and alienation* –
>
> (1) *In general.* For purposes of this section, the terms "assignment" and "alienation" include –
>
> (ii) Any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may

> become, payable to the participant or beneficiary.

Treasury's reasonable interpretation of its regulation precludes DuPont's interpretation. *See* 29 U.S.C. § 1144(d) ("Nothing in this title shall be construed to alter . . . impair or supersede any law of the United States . . . or any rule or regulation issued under such law.").

"Arrangement" is the key word in Treasury's regulation. Since *Black's Law Dictionary* does not define this term, the Estate turns to *Webster's Third New International Dictionary* (Merriam-Webster 1993) at 120, which defines "arrangement" as "the act or action of arranging or putting in correct, convenient, or order. . . ." An "arrangement" must result in an order through which one person "acquired" property enforceable against a plan on June 2, 1994, the date of the divorce. But ex-spouse Liv did not order or systematize her property to dictate who would receive William's SIP benefits on June 2, 1994. As DuPont argues, "William could have changed his beneficiary designation at any time during the seven years between the divorce and his death . . . " Merits Response at 3. Liv could not have transferred an interest in her divorcing ex-husband's pension to anyone. DuPont did not "acquire" William's pension benefits on June 2, 1994 divorce, since ex-spouse Liv had nothing to convey on that date.

DuPont contends that Liv's waiver is an "indirect arrangement" under Treasury's regulation – an

argument the United States rejects. William Kennedy had not retired by his divorce, so he could not "acquire" benefits on that date. He was alive, so no probate estate on June 14, 1994 "acquired" benefits. DuPont cites Judge Easterbrook's suggestion in his *Fox Valley* dissent, 897 F.2d at 282-83, to suggest that a waiver is "an anticipatory gift, to whoever is next in line under the Fund's rules," but William's pension benefit would not pass until after death and, further, a gift requires a donor, donee, and transfer – which was impossible in 1994 when there was a waiver and no probate estate. Because there was no donation, no delivery and no donee on June 2, 1994, there was no "gift." *See Brown v. O'Keefe*, 300 U.S. 598, 602 (1937) (under "the law of gifts and legacies," rejection leaves the title "as if the gift had not been made.").

Contrary to DuPont's argument on page 16, Liv's waiver was not an indirect "arrangement" under the Treasury Regulation, for no one "acquired" property enforceable against the plan on June 2, 1994. The Fifth Circuit erred in holding that 1994 waiver of rights was a "direct or indirect" assignment.

In *Boggs,* this Court applied ERISA to an attempted testamentary transfer from Dorothy Boggs to her sons in a will. Dorothy bequeathed to her husband Isaac Boggs one-third of her estate, and a lifetime usufruct – equivalent to a common-law life estate – in the remaining two-thirds of Isaac Boggs' pension benefits. She bequeathed to her sons the remaining two-thirds, subject to Isaac's usufruct, disposing of her community property interest in

Isaac's undistributed pension plan benefits. Dorothy made a transfer to her sons, through her will, of her share of husband Isaac's pension benefits. It did not involve a waiver of benefits. *Boggs* does not apply to a voluntary waiver.

II. The Fifth Circuit erred in holding that ERISA's QDRO provision is the *only* way a divorcing spouse can waive an ex-spouse's pension benefits.

A. The Estate was a proper beneficiary of William Kennedy's pension benefits.

Contrary to AARP's brief at 11, the Estate is a beneficiary of William Kennedy's DuPont benefits. She appears not as a private party, but as a court-appointed executrix acting as a fiduciary for creditors. The Estate has standing to seek relief, for ERISA defines a beneficiary as a "person designated by a participant, or by terms of an employee benefit plan, who is *or may become entitled* to a benefit thereunder." 29 U.S.C. § 1002(8) (emphasis added).

The Estate is a beneficiary under DuPont's SIP because the Estate may become entitled to SIP benefits. The SIP states that if "no beneficiary designation is in effect, distribution shall be made to . . . the executor or administrator of the decedent's estate." J.A. at 48. In addition, "[i]f in the opinion of the Company there is a question as to the legal right of any beneficiary to receive a distribution under the Plan, the amount in question may be paid to the

decedent's estate . . . " J.A. at 49. Ex-spouse Liv waived her rights making her beneficiary-designation ineffective. Because the beneficiary-designation on file on the decedent's date of death was legally ineffective, William Kennedy's pension benefits must be made to the Kennedy Estate.

AARP cites Internet articles and the like to argue that ordinary folks ought to know the importance of changing their ERISA-beneficiary designations. But the list of cases cited in the Estate's *certiorari* petition demonstrates that many divorcing spouses do not get the message, forget to change their forms, or run out of time before they die.

AARP cites *Guidry v. Sheet Metal Workers Nat'l Pension Fund,* 493 U.S. 365 (1990) to argue that a QDRO is the only exception to ERISA's anti-alienation statute. But *Guidry* concerned liability for a criminal penalty. Curtis Guidry had served as a trustee of one of three union pension plans before he pled guilty to stealing money from the union. While Guidry was incarcerated, two plans shackled him with a "constructive trust" that withheld benefits until he reimbursed union losses. The Tenth Circuit held that ERISA's anti-alienation provision did not preclude a constructive trust. This Court reversed, holding that the union, a creditor, was garnishing pension benefits and that it was "inappropriate to approve any generalized equitable exception either for employee malfeasance or criminal misconduct." *Guidry,* 493 U.S. at 376. A garnishment exception conflicted with ERISA's protection of the "interests of

the participants and beneficiaries of employee welfare and pension benefit plans." *Id.* at 376. This case does not involve an attempt by a non-related third party to take pension benefits from a living participant. The Estate does not seek a general exception to ERISA's spendthrift provisions for the benefit of creditors or to punish criminal misconduct, as in *Guidry*. Instead, the Estate argues that a waiver enforceable under federal common law is not a prohibited alienation or assignment.

B. William Kennedy revoked "any and all" prior beneficiary designations in favor of ex-spouse Liv on June 7, 2004, four days *after* his divorce.

On page 9 of its Response, DuPont discussed William Kennedy's post-divorce, June 7, 1994 execution of a new beneficiary-designation form:

> Several days after entry of the divorce decree, William executed a new beneficiary-designation form to make his daughter, Kari, the beneficiary of the portion of the retirement benefits that William retained under the Pension and Retirement Plan. J.A. 62. The change did not apply to the SIP.

But DuPont does not *quote* that "Company-Paid Survivor Benefits (Pre-Retirement)" form. DuPont's beneficiary-redesignation form reads:

> "The following election revokes and supersedes any and all previous designations."

J.A. at 62. Contrary to DuPont's conclusory statement, that beneficiary-change form did *not* limit its revocatory and superseding effect to one plan only. William, who signed DuPont's form a few days after his divorce, had good reason to believe that he had revoked and superseded "*any and all*" designations of ex-spouse Liv as his sole beneficiary.

If the scope of that post-divorce, June 7, 1994 revocation is unclear, all ambiguities in DuPont's ERISA plan and beneficiary designations must be construed in accord with the reasonable expectations of participant William Kennedy. *See Gallagher v. Reliance Standard Life Ins. Co.,* 305 F.3d 264, 269 (4th Cir. 2002); *Perez v. Aetna Life Ins. Co.,* 150 F.3d 550, 556-57 (6th Cir. 1998) (*en banc*). Courts enforce the principle of *contra proferentem,* construing ambiguities against the drafter, *i.e.,* the plan, under federal common law. *Miller v. Monumental Life Ins. Co.,* 502 F.3d 1245, 1254 (10th Cir. 2007) ("Our court has never construed the ambiguities of an ERISA plan against the beneficiary."); *Chiles v. Ceridian Corp,* 95 F.3d 1505, 1518 (10th Cir. 1996); *Lee v. Blue Cross/Blue Shield of Alab.,* 10 F.3d 1547, 1551 (11th Cir. 1994); *Todd v. AIG Life Ins. Co.,* 47 F.3d 1448, 1451-52 (5th Cir. 1995) (same); *Philips v. Lincoln Nat'l Life Ins. Co.,* 978 F.2d 302, 311 (7th Cir. 1992).

Any refusal to construe ambiguities against DuPont would "afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted, a result that would be at odds with the congressional purposes of promoting the

interests of employees and beneficiaries and protecting contractually defined benefits." *Miller,* 502 F.3d at 1254. If there is any ambiguity as to whether it revokes and supersedeas "any and all" former designations in favor of Liv, the ambiguity is construed against the drafter, DuPont. William revoked prior beneficiary designations on June 7, 1994. If a beneficiary designation form is a plan document, DuPont's plan-administrator erred by disregarding William's revocation of his pre-divorce beneficiary designations in favor of ex-spouse Liv.

C. Given her use of a QDRO to protect her interest in part of William Kennedy's DuPont benefits, ex-wife Kennedy's waiver of pension proceeds did not violate ERISA.

On page 12 of its Response, DuPont criticizes the late William Patrick Kennedy for not doing one of three different things to ensure that his SIP benefit went to someone other than ex-wife Kennedy. But the attorneys who drafted William and Liv Kennedy's 1994 divorce decree agreed that Liv would knowingly, intelligently, and expressly waive her rights to SIP benefits. There was no need for the divorcing Kennedys to submit a QDRO for the SIP benefits because no remaining proceeds were subject to property-division in divorce court. APP. 4 at 44 (district court opinion). The Fifth Circuit's decisions in *Stobnicki* and *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321 (5th Cir. 1994), *cert. denied*, 513 U.S. 1081 (1995) led the divorce

court judge and the Kennedy attorneys to believe that a voluntary waiver in a court-approved division of marital property would be respected rather than repudiated.

D. A flexible federal common law analysis ensures justice and fulfills the reasonable expectations of plan participants, heirs, and beneficiaries.

The Fifth Circuit's opinion undermines this Court's determination, in *Firestone,* 489 U.S. at 110, that federal courts have the power to enforce federal common law. The Fifth Circuit failed to consider 29 U.S.C. § 1104 as a whole and elevated the convenience of administrators, over ERISA's prime directive to protect the interests of participants and beneficiaries. Section 1104(a)(1) imposes a fiduciary standard on the plan administrator, requiring him to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." The *Kennedy* panel should have adhered to *Brandon* and *Stobnicki* rather than follow the Third Circuit into a quagmire.

The Fifth Circuit's new distinction between enforceable divorce-decree waivers of welfare benefits and unenforceable divorce-decree waivers of pension benefits undermines ERISA's goal of uniform regulation. The existence of two, three, or even more conflicting standards governing ERISA waivers undermine ERISA's goal of fostering "nationally uniform plan administration." *Egelhoff,* 532 U.S. at 148.

III. Enforcing voluntary waivers of ERISA benefits under federal common law will not materially increase the burdens of ERISA plan administrators.

A. This Court Declined to Grant Petitioner's Issue #2, concerning the "Plan Documents" rule, so DuPont's efforts to argue a "Plan Documents" defense fall outside the proper scope of this appeal.

As the United States observed on page 23 of its *amicus* brief, "This Court limited its grant of *certiorari* to the third question presented. . . . It thereby declined to grant review of the second question, which asked whether federal common law requires respondents to give effect to Liv Kennedy's waiver. . . ." Petitioner's second issue read as follows:

> 2. Does federal common law, as applied to Ex-Spouse Liv Kennedy's waiver of any right to receive William P. Kennedy's pension benefits in a 1994 divorce-decree, govern the judicial determination of whether DuPont's Plan Administrator wrongfully paid Mr. Kennedy's SIP benefits to his ex-spouse Liv Kennedy, as the District Court ruled, or was that court restricted to examining only DuPont's "Plan Document," that is, the late William P. Kennedy's 1974 beneficiary designation of his then-wife?

Petition at i. DuPont and its *amici* allies now seek affirmation under the "Plan Documents" defense, rather than ERISA's QDRO provision. Those "Plan

Documents" arguments fall outside this Court's grant of *certiorari,* and Petitioner objects. Deciding this case on the basis of an extra-*certiorari* issue would deny litigants to present a record of a real "Plan Documents" appeal and deprive interested parties of notice and an opportunity to file *amici* on a within-*certiorari* issue before a decision. Kennedy's briefing focuses on the issue the Fifth Circuit decided – and the one this Court asked her to brief.

B. *If* the "Plan Documents" defense is before this Court, the government's opinions about it do not command deference.

In contrast to the United States' compelling interpretation of ERISA's spendthrift and QDRO provisions, the government's opinions about "Plan Documents" on pages 22-32 of the United States' *amicus* brief do not compel this Court's deference and, furthermore, are not persuasive. The administration cites no Treasury or Labor Department rules, regulations, or opinions. That *amicus* brief, at 24-25, cites this Court's decisions and refers to common law "principles" of law, but not administrative rulemaking. "When the administrative interpretation is not based on expertise in the particular field, however, but is based on general common law principles, great deference is not required." *Jicarilla Apache Tribe v. FERC,* 578 F.2d 289, 292-93 (10th Cir. 1978).

The government asserts that the QDRO provisions provide "useful guidance" in interpreting ERISA, but an agency opinion that "does little more than restate the terms of the statute itself" does not merit controlling deference. *See Gonzalez v. Oregon,* 546 U.S. 243, 257 (2006). "An agency does not acquire special authority to interpret its own words when . . . it has elected merely to paraphrase the statutory language." *Id.*

The government's opinions about statutory construction cannot supersede this Court's authority to render a first-impression interpretation of a federal statute. The administration has not shown that Congress authorized its employees to offer opinions about the Plan Documents defense as Congress authorized the Secretaries of Labor and Treasury to construe ERISA's QDRO provision. Nor have those departments promulgated regulations under Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706(2) (1996), after providing notice. *See United States v. Mead Corporation*, 533 U.S. 218, 226-27 (2001). Finally, if "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . ." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984). The administration's *amicus* views about the Plan Document defense are not entitled to deference, and, by the United States' own admission on page 23, footnote 8, fall outside this Court's *certiorari* grant.

C. *If* the "Plan Documents" defense is before this Court, neither ERISA nor DuPont defined beneficiary-designations as plan documents.

DuPont argues a "Plan Documents" defense outside the scope of this Court's *certiorari* grant. The Estate reasserts its objections but feels compelled to respond.

DuPont's arguments reflect an unarticulated assumption that always-changing beneficiary designations are "plan documents" under 29 U.S.C. §§ 1102(a)(1), 1102(b), and 1104(a)(1)(D). The assumption is unwarranted. In *McGowan*, Judge Fuentes cautioned that assumption:

> Judge Van Antwerpen's opinion reads this provision as allowing all documents filed with the Plan to govern its administration, including forms filed to designate beneficiaries. However . . . I note in passing that the governing documents could reasonably be limited to those that set forth the terms of the plan.

McGowan, 423 F.3d at 258 n.17 (dissent), referencing *McElroy v. SmithKline Beecham Health & Welfare Benefits Trust Plan for U.S. Employees,* 340 F.3d 139, 143-44 (3d Cir. 2003) ("Clearly, the 'documents and instruments governing the plan' do not necessarily include all relevant documents and, in particular, do not necessarily include the plaintiff's claim file.").

ERISA's "definitions" section, 29 U.S.C. § 1002, defines plans, employees, participants, beneficiaries, and other terms, but does not define "plan documents." Nor do the Congressional findings that precede ERISA. *See* 29 U.S.C. §§ 1001 and 1001(a). To determine what are "plan documents," this Court turns to 29 U.S.C. §§ 1022-1025. The most pertinent provision, § 1024(b)(4), requires plans to provide participants and beneficiaries with "a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." The list does not include beneficiary designations. In *Hughes Salaried Retirees v. Administrator of Hughes,* 72 F.3d 686, 688 (9th Cir. 1995) (*en banc*), *cert. denied,* 517 U.S. 1189 (1996), the court held that a list of plan participants and their addresses was not an instrument "under which the plan is established or operated" under § 1024(b)(4):

> The relevant documents are those that provide individual participants with information about the plan and benefits . . . Unlike the documents specifically listed in § 1024(b)(4) . . . participants' names and addresses provide no information about the plan or benefits. As the district court said it so aptly, it would strain the meaning of "other instruments under which the plan is established or operated" to interpret it to include participant names and addresses.

Hughes, 72 F.3d at 690, *citing Curtiss-Wright Corp. v. Schoonejongen,* 514 U.S. 73 (1995). If beneficiary designations were "plan documents," their disclosure to anyone requesting them under 29 U.S.C. § 1024(b)(4) would subject plan beneficiaries to harassment, emotional abuse, telemarketing and other forms of solicitation. *Id.* at 694-95. Just as a plan's list of names and addresses is not a plan document, a beneficiary designation is not a plan document.

Because ERISA does not define a beneficiary designation as a plan document, a company has to give participants notice, lest a participant lack notice of what she, her beneficiaries, and her heirs stand to lose. DuPont cannot transmute its beneficiary designations into "plan documents" by slapping that label on them. DuPont's SIP did not define designations as plan documents. *See* Dkt. 40-1 at 4 and 33-67. It reads as follows:

> **PLAN DOCUMENTS**
>
> This summary plan description is intended to provide you with a reasonably thorough explanation of the Savings and Investment Plan. . . . *The official plan texts are the E.I. DuPont de Nemours and Company Savings and Investment Plan and the Trustee Agreement between the Company and the plan trustee.* These texts are the governing documents in the event questions arise.

Dkt. 40-1, p. 61 (italics supplied). Although DuPont asserts that beneficiary designations are plan documents, it did not characterize them that way for its

participants and beneficiaries. Its plan has only two governing documents: the Plan and the Trustee Agreement. None of DuPont's beneficiary designations state that they are plan documents. J.A. 34 (TRASOP); 56-57 (Thrift Plan); 62 (Survivor Benefits). DuPont's beneficiary-designation forms are not plan documents.

D. The "Plan Documents" defense rewrites ERISA's plain statutory language.

DuPont's "Plan Documents" rule, which focuses on 29 U.S.C. §§ 1102 and 1104, rewrites ERISA in defiance of traditional statutory construction rules. The first describes how ERISA plans are established, while the second imposes a "prudent man standard of care" on administrators. Neither statute addresses beneficiary-change issues. The statutes require that a plan administrator "not take actions that are inconsistent with the plan's guidelines." *McGowan,* 423 F.3d at 254 (Becker, J., concurring). "[N]othing in the language [of § 1104] prohibits the administrator from consulting other documents, insofar as those documents do not conflict with the language of the plan."

An administrator must consult other documents to determine whether a participant has obtained a valid QDRO. *Id*. "The provision authorizing QDROs explicitly states that such orders are exempt from ERISA's anti-alienation clause but says nothing whatsoever about § 1104(a)(1)(D). This suggests that Congress simply did not see a conflict between the

requirement that plan administrators perform their duties 'in accordance with the documents and instruments governing the plan' and the requirement that they give effect to a transfer of benefits pursuant to a QDRO. . . ." *Id.*; *see also* Gorris, 155 U. PA. L. REV. at 734 and nn. 100-101.

By elevating the convenience of plan administrators above their fiduciary duty to work on behalf of participants and beneficiaries, the Sixth Circuit deprived a widow of needed funds and awarded a windfall to an ex-spouse. DuPont asks this Court to absolve plan administrators for breaches of fiduciary duty in a manner Congress neither enacted nor intended.

E. The enforcement of voluntary divorce-decree waivers will not materially increase the burdens of ERISA plan administrators.

1. This case arose only because DuPont paid William Kennedy's SIP funds without regard for the Estate after ignoring repeated pleas to recognize that Liv waived her rights.

A reversal of the Fifth Circuit's decision will not require plan administrators to scrutinize every file. Administrators need only pay attention to voluntary, written, attorney-negotiated, court-approved waivers when claims are made before payout. This case went to court because a DuPont paralegal disregarded

repeated pre-lawsuit demands in which the Estate begged DuPont to enforce a valid waiver. Although aware of the circuit split concerning waivers, DuPont nevertheless gave a spendthrift ex-spouse a windfall without even attempting to protect an executor's interest. J.A. at 3, 33; Appellee's Reply Brief (07/13/2006) at 2-3. An interpleader would have protected the funds from spendthrift Liv until DuPont secured a stakeholder's discharge and recovered its fees from registry funds.

2. Administrators already have to investigate divorce decrees, QDROs, QPSAs, QJSAs, and other documents, so enforcement of voluntary waivers will not materially increase plan expenses.

DuPont argues that a plan administrator should not have to read anything but the plan to determine who is a beneficiary. But administrators always have to review documents outside the plan, *e.g.,* QDROs, QPSAs, QJSAs, marriage licenses, and death certificates. In *Fox Valley,* the Seventh Circuit explained that "no such additional burdens will be imposed because . . . a plan administrator must investigate the marital history of a participant and determine whether any domestic relations orders exist that could affect the distribution of benefits." *Id.,* 897 F.2d at 282; *cf. Estate of Altobelli v. IBM*, 77 F.3d 78, 81 (4th Cir. 1996).

The bright-line rule DuPont proposes is neither bright nor linear, for courts enforce QDROs liberally, not literally. In *Metropolitan Life Ins. Co. v. Wheaton,* 42 F.3d 1080 (7th Cir. 1994), Judge Posner rejected an objection that a QDRO failed to list addresses of a participant's minor sons and concluded that ERISA must be flexibly interpreted.

> It is asking too much of domestic relations lawyers and judges to expect them to dot every *i* and cross every *t* in formulating divorce decrees that have ERISA implications. . . .

Id. at 1084-85; *see also Tolstad v. Tolstad*, 527 N.W.2d 668, 671-72 (N.D. 1995) (same).

ERISA beneficiary status often depends on marital status, which changes as new laws redefine marriages and spouses. Plan administrators who hope to discharge their fiduciary duties must look beyond beneficiary designations. They must resolve complex issues about common law marriages in Alabama, Colorado, the District of Columbia, Georgia, Idaho, Iowa, Kansas, Montana, New Hampshire, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, *Common Law Marriage*, at http://www.ncsl.org/programs/cyf/commonlaw.htm (07/28/08).

Plan administrators now have to define marriage under "civil union," domestic partnership, and reciprocal-beneficiary statutes and court decisions that

give same-sex couples all or most benefits available to married opposite-sex couples. *See* CONN. GEN. STAT. § 46b-38nn (2006); D.C. LAW 16-79 (Act 16-265) (2006); HAW. REV. STAT. § 572C-2 (1997); 2004 ME. LEGIS. SERV. CH. 672 (H.P. 1152; L.D. 1579); 2001 ME. LEGIS. SERV. CH. 347 (H.P. 1256; L.D. 1703); N.H. REV. STAT. ANN. § 457-A (2007); N.J. STAT. ANN. § 37:1-29 (2006); OR. LAWS CH. 99 (2007); 15 VT. STAT. ANN. § 1201 (1999); and WASH. REV. CODE CH. 26.60 (2006). *Cf. In re Marriage Cases,* No. S147999 *et al.,* 43 Cal. 4th 757, 183 P.3d 384 (Cal. 2008); *Martinez v. Cty. of Monroe,* 2008 NY Slip Op. 909, 50 A.D.3d 189, 850 N.Y.S.2d 740 (N.Y. 2008) (not published); *Opinions of Justices to the Senate,* 802 N.E.2d 565 (Mass. 2004); *Kerrigan v. Comm'r of Public Health,* No. SC No. 17716 (Ct., argued May 14, 2007) (pending). The Defense of Marriage Act, 1 U.S.C. § 7 and 28 U.S.C. § 1738C, allows states and the United States to avoid acknowledging other states' same-sex laws, but does not tell plan administrators what marriages to recognize.

Enforcing waivers takes time. But plan administration always takes time. *McGowan,* 423 F.3d at 254-55 (J. Becker, concurring). Administrators already review QDROs, QPSAs, and "extraneous" documents such as the Estate's demand letter. J.A. 76, ¶ 20. When it enacted the "prudent man" fiduciary standard, 29 U.S.C. § 1104, Congress required plan administrators to read, think, and act.

DuPont exaggerates the risk that disputes over voluntary waivers will compel interpleader actions.

In 1996, the editor of the *ERISA Litigation Reporter* described how plan administrators resolve most waiver disputes without litigation:

> Must a plan take every purported waiver into court in order to figure out whether it applies to the beneficiary designation? We don't have a satisfying response to this objection, other than to note [that] in our own practice we have been able to solve dozens of beneficiary disputes without yet having been forced into an interpleader action.

Who Is the Payee, Part VIII: Altobelli v. IBM and the Other Beneficiary Waiver Cases, ERISA LITIG. REPTR. 14, 17 (Aug. 1996); Gorris, 155 U. PA. L. REV. at 735 n. 107. Most claimants will voluntarily divide disputed benefits and then notify the plan of their settlement. Courts can then enforce such a settlement. *Stobnicki,* 868 F.2d at 1465.

3. Interpleaders enable administrators to recover plan attorneys' fees.

The district court correctly concluded that "an interpleader action would have been the best and most efficient means for resolving this dispute in the first place." Pet. at APP. 26. *See also* Timothy J. Snyder, *Supreme Court rules that ERISA preempts state laws on beneficiary designations,* DELAWARE EMPLOYMENT LAW LETTER (June 4, 2001) ("Generally, our advice would be to "interplead" the funds. . . . you as the employer will be entitled to your attorneys' fees and the costs of preparing and filing the interpleader

complaint and sending notice. . . ."); Editor, Employee Benefits Institute of America's EBIA WEEKLY, at http://www.ebia.com/WeeklyArchives/401k/CourtCases/16275 (07/27/2008) (same).

DuPont could have deposited William's SIP funds into a federal or Texas court registry, moved for discharge, and recovered its attorneys' fees. "Under the common law, a stakeholder is entitled to recover its attorneys fees from the deposited funds unless there were no rival claimants or the interpleader was unreasonably delayed." *State Farm Life Ins. Co. v. Martinez,* 216 S.W.3d 799, 803 (Tex. 2007) (a beneficiary-designation dispute). *See also* William V. Dorsaneo, TEXAS LITIGATION GUIDE § 22 (Matthew Bender 2008); 28 U.S.C. § 2361.

On pages 12-14 of its brief, the Western Conference of Teamsters Pension Trust Fund complained that administrators do not always recover every penny of their fees. But courts routinely award such fees to stakeholders. "Compensable expenses include preparing the complaint, obtaining service of process on the claimants to the fund, and preparing an order discharging the stakeholder from liability and dismissing it from the action." *Trustees of Directors Guild of America-Producer Pension Benefits Plans v. Tise,* 234 F.3d 415, 427 (9th Cir. 2000); 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE § 1719 & n. 20 (1986). Efficient interpleaders recover *all* fees. *Rhoades v. Casey,* 196 F.3d 592, 595 (5th Cir. 1999), *rhg. & rhg. en banc*

denied, 209 F.3d 721 (5th Cir. 2000), *cert. denied,* 531 U.S. 924 (2000) (affirming a $23,955.21 award).

Fee-recovery problems result from poorly-drafted plans; unwise litigation; and client-deficient senior partners in tall building law firms who do not use form-files. Western Conference cited one such example: *First Trust Corp. v. Bryant,* 410 F.3d 842 (6th Cir. 2005). "Had First Trust properly followed the interpleader procedures, sued in the proper venue, and impleaded all of the claimants of which it was aware, as it was legally obligated to do, it would not have gotten entangled in the litigation." *Id.* at 851. A beneficiary who defeats a rival beneficiary can recover attorneys' fees against a culpable party, such as an ex-spouse who voluntarily waived her rights. 29 U.S.C. § 1132(g)(1). This Court's opinion can direct district courts to reimburse plan administrators who file proper interpleaders and for claimants who prevail in them.

F. A state court suit against Liv Kennedy would have been pointless.

DuPont and several *amici* argue that the Estate should have sued ex-spouse Liv in state court under a contractual or equitable claim to recover pension benefits – but only *after* DuPont paid Liv. The Estate sued Liv for breach of contract, R., Dkt. 24, but DuPont argued that "[c]laims of breach of contract under state law are clearly pre-empted by ERISA." R., Dkt. 40 at 27 and Dkt. 41. The law does not require a

"useless ceremony." *Cheney v. Libby,* 134 U.S. 68, 81 (1890). Suing Liv after DuPont paid was useless. DuPont's payments were a windfall to Liv, who had "forgotten all about the account," but soon spent $402,000.00 on a Norwegian smorgasbord of excess. J.A. at 58-59.

A plan administrator can preserve a beneficiary's right to recover disputed funds by filing an interpleader to recover reasonable fees, make the plan whole, and ensure that a recipient does not squander windfall benefits. DuPont *chose* to crusade for a Plan Documents Rule at its plan's expense, elevating financial interests over fiduciary duties to participants and beneficiaries. DuPont forced the Estate to enforce Liv's voluntary waiver under federal common law.

CONCLUSION

Petitioner Kari Ellen Kennedy, Independent Executrix of the Estate of William Kennedy, requests this Court to REVERSE the August 15, 2007 decision of the Fifth Circuit and to REINSTATE the October 5, 2005 judgment of the Eastern District of Texas. Alternatively, the Estate asks this Court to REVERSE and REMAND for a new trial.

Respectfully submitted,

STACY L. KELLY
Counsel of Record
1925 Lexington Street
Houston, Texas 77098
(713) 408-8134
(832) 533-2274 (fax)
slkesq55@comcast.net

DAVID A. FURLOW
KEVIN PENNELL
MORGAN GASKIN
THOMPSON & KNIGHT LLP
333 Clay Street, Suite 3300
Houston, Texas 77002
(713) 654-8111
(832) 397-8253 (fax)
david.furlow@tklaw.com

Attorneys for Petitioner Kari Ellen Kennedy