

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 SUPPLEMENTAL BRIEFING
CONCERNING 29 U.S.C. § 1104(a)(1)(D)**

—◆—
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

QUESTION PRESENTED FOR REVIEW

Whether 29 U.S.C. § 1104(a)(1)(D), mandating administration of a plan in accordance with plan documents, required that the distribution in question be made to Liv Kennedy, even on the assumption that a waiver of her interest was not otherwise subject to statutory bar?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iv
SUMMARY OF ARGUMENT	1
ARGUMENT.....	3
I. The SIP beneficiary designation Liv Kennedy waived was not a “document or instrument governing” DuPont’s Plan under the plain meaning of 29 U.S.C. § 1104(a)(1)(D).....	3
A. While ERISA’s “prudent man” standard of care imposes traditional, common law trust fiduciary duties on administrators, it does not mandate that they ignore express, voluntary waivers of benefits.....	3
1. 29 U.S.C. § 1104(a)(1)(D) is a fiduciary duty law, not a beneficiary determination law	3
2. Beneficiary designations do not “govern” a plan	8
3. Neither ERISA nor DuPont’s Plan Summary warns participants and beneficiaries that beneficiary designations are non-waivable.....	12

TABLE OF CONTENTS – Continued

	Page
B. The most well-reasoned decisions reject DuPont’s notion that 29 U.S.C. § 1104(a)(1)(D) precludes courts from recognizing waivers.....	14
II. Application of 29 U.S.C. § 1104(a)(1)(D) to beneficiary designations would result in absurd and adverse consequences.....	16
A. Treating beneficiary designations as “Plan Documents” when they are not, and precluding federal common law enforcement of voluntary, written waivers, conflicts with Congress’ effort to create a uniform, federal common law of ERISA including judicial consideration of all relevant evidence.....	16
B. DuPont’s “Plan Documents” Rule would reward children and spouses who slay their participant parents and spouses.....	20
III. DuPont’s Plan Administrator breached the Plan’s 29 U.S.C. § 1104(a)(1)(B) fiduciary duty to the Estate by failing to consider the divorce decree waiver, despite DuPont’s prepayment receipt and maintenance of those papers as “a record of DuPont with regard to the SIP account...with other DuPont records relating to Mr. Kennedy’s SIP account....”	21
CONCLUSION	23

TABLE OF AUTHORITIES

	Page
FEDERAL CASES	
<i>Atwater v. Nortel Networks, Inc.</i> , 388 F.Supp.2d 610 (M.D. N.C. 2005)	22
<i>Boggs v. Boggs</i> , 520 U.S. 833 (1997)	16
<i>Brown v. Routzahn</i> , 63 F.2d 914 (6th Cir.), <i>cert.</i> <i>denied</i> , 290 U.S. 641 (1933)	5
<i>Central States, Southeast & Southwest Areas</i> <i>Pension Fund v. Central Transport</i> , 472 U.S. 559 (1985)	13
<i>Curtiss-Wright Corp. v. Schoonejongen</i> , 514 U.S. 73 (1995)	11
<i>Director of Revenue of Mo. v. CoBank, ACB</i> , 531 U.S. 316 (2001)	6
<i>Edmonds v. Compagnie Generale Transatlan-</i> <i>tique</i> , 443 U.S. 256 (1979)	6
<i>Egelhoff v. Egelhoff</i> , 532 U.S. 141 (2001)	16
<i>Fourco Glass Co. v. Transmirra Products Corp.</i> , 353 U.S. 222 (1957)	8
<i>Franklin Nat'l Bank v. New York</i> , 347 U.S. 373 (1954)	7
<i>Gallagher v. Reliance Standard Life Ins. Co.</i> , 305 F.3d 264 (4th Cir. 2002)	18
<i>Hughes Salaried Retirees v. Administrator of</i> <i>Hughes</i> , 72 F.3d 686 (9th Cir. 1995) (<i>en banc</i>), <i>cert. denied</i> , 517 U.S. 1189 (1996)	10, 11, 12

TABLE OF AUTHORITIES – Continued

	Page
<i>INS v. Nat’l Center for Immigrants’ Rights</i> , 502 U.S. 183 (1991).....	4
<i>Manning v. Hayes</i> , 212 F.3d 866 (5th Cir. 2000)....	14, 15
<i>McElroy v. SmithKline Beecham Health & Welfare Benefits Trust Plan for U.S. Employees</i> , 340 F.3d 139 (3d Cir. 2003).....	9
<i>McGowan v. NJR Service Corp.</i> , 423 F.3d 241 (3d Cir. 2005), <i>cert. denied</i> , 547 U.S. 1017 (2006).....	8, 9
<i>Metro. Life Ins. Co. v. Hamm</i> , 2003 U.S. Dist. LEXIS 19839, 2003 WL 22518183 (E.D. Pa. 2003).....	22
<i>Metro. Life Ins. Co. v. Bigelow</i> , 283 F.3d 436 (2d Cir. 2002).....	22
<i>Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl Protection</i> , 474 U.S. 494 (1986).....	6, 16
<i>Ratzlaf v. United States</i> , 510 U.S. 135 (1994)	10
<i>U.S. v. McCrackin</i> , 189 F.Supp. 632 (S.D. Ohio 1960)	5
<i>U.S. v. Estate of Romani</i> , 523 U.S. 517 (1998).....	8
<i>Whitman v. American Trucking Ass’ns, Inc.</i> , 531 U.S. 457 (2001).....	7
 STATE CASES	
<i>Keen v. Weaver</i> , 121 S.W.3d 721 (Tex. 2003).....	20
<i>Strong v. Omaha Constr. Indus. Pension Plan</i> , 270 Neb. 1, 701 N.W.2d 320 (2005)	14

TABLE OF AUTHORITIES – Continued

	Page
FEDERAL STATUTES	
15 U.S.C. § 77n	6
15 U.S.C. § 78bb	6
29 U.S.C. § 1002	9
29 U.S.C. § 1022	1, 9
29 U.S.C. § 1022(b).....	1, 13
29 U.S.C. § 1024	1, 10
29 U.S.C. § 1024(b)(4).....	1, 10, 11, 12
29 U.S.C. § 1025	1, 9
29 U.S.C. § 1025(a).....	1, 12
29 U.S.C. § 1026	1
29 U.S.C. § 1054	7, 8
29 U.S.C. § 1055	7, 8
29 U.S.C. § 1055(c)(1)(A)	5, 7, 8
29 U.S.C. § 1056	7, 8
29 U.S.C. § 1056(d).....	7, 8
29 U.S.C. § 1056(d)(1).....	7, 8
29 U.S.C. § 1056(d)(3).....	3, 8
29 U.S.C. § 1056(d)(3)(B)(ii)	7, 8
29 U.S.C. § 1056(d)(3)(G)	7, 8
29 U.S.C. § 1056(d)(3)(H)	7, 8
29 U.S.C. § 1056(d)(3)(K)	7, 8
29 U.S.C. § 1102.....	9

TABLE OF AUTHORITIES – Continued

	Page
29 U.S.C. § 1103(c).....	4
29 U.S.C. § 1103(d).....	4
29 U.S.C. § 1104(a).....	5, 9
29 U.S.C. § 1104(a)(1).....	4, 6
29 U.S.C. § 1104(a)(1)(A)(i).....	6
29 U.S.C. § 1104(a)(1)(B).....	5, 21
29 U.S.C. § 1104(a)(1)(D).....	<i>passim</i>
29 U.S.C. § 1342.....	4
29 U.S.C. § 1344.....	4
 SCHOLARLY AND SECONDARY SOURCES	
Bogert, George R. & Bogert, George T., <i>Law of Trusts and Trustees</i> § 583 (2d rev. ed. 1980).....	13
Garner, Bryan A. (ed.), <i>Black’s Law Dictionary</i> (8th ed. 2004).....	9
I.R.S. GEN. COUNSEL MEM. 39,858, 1991 WL 776304 (Sept. 23, 1991).....	20
Newman, Lawrence and Kalter, Albert, <i>The Need for Disclaimer Legislation – An Analysis of the Background and Current Law</i> , 28 TAX LAWYER 571 (1975).....	5-6
 RESTATEMENT (SECOND) OF CONTRACTS § 84 cmt. b (Am. L. Inst. 1981).....	
	2, 17

SUMMARY OF ARGUMENT

The “documents and instruments governing” a plan under ERISA’s “prudent man” standard of care statute, 29 U.S.C. § 1104(a)(1)(D), do not include beneficiary designations. That statute did not require DuPont’s Plan Administrator to pay Liv Kennedy benefits she knowingly, voluntarily, and expressly waived. The clear, unambiguous waiver in Liv’s divorce decree was in the Plan Administrator’s file *before* payout. The federal common law precedent of most courts, and the collective wisdom of 45 legislatures, recognizes that divorced spouses do not knowingly enrich ex-spouses to the detriment of children. So should this Court.

The “Plan Documents” defense rewrites ERISA. A designation is not a “document or instrument governing” DuPont’s 401k Plan under a plain-meaning interpretation of § 1104(a)(1)(D). Ever-changing beneficiary designations are not among the “documents” and “instruments” governing a plan in 29 U.S.C. §§ 1022-1026.

Neither DuPont’s designations nor its Plan Summary gave notice of a “Plan Documents” Rule that precludes challenges based on waiver and the traditional rule that wrongdoers must not profit by wrongdoing. DuPont’s rule would reward murderous children and spouses who slay plan-participant parents and spouses; incentivize fraud during negotiations; and undermine regulations governing gifts, disclaimers, and taxes.

Although DuPont argues that only lawyers can determine whether a waiver is voluntary, the contrary is true. Millions of times every year, hundreds of thousands of non-lawyer police officers, deputies, constables, and justices of the peace decide whether a suspect's waiver of *Miranda* rights is knowing and voluntary. Waivers of jury trials, appeals, and liability as well as medical consent waivers, are part of everyday life.

Judicial extension of a "Plan Documents" Rule to include designations would conflict with specific, later-enacted ERISA provisions controlling the form and payment of benefits. Such a deviation from traditional statutory interpretation would decrease respect for the legitimacy of all law. It would deny courts their ERISA-mandated role of creating a federal common law of benefits where judges act on the basis of all available evidence. It would eviscerate a uniform concept of voluntary waiver based on RESTATEMENT (SECOND) OF CONTRACTS § 84 comment b. It would privatize law, replacing federal statutory uniformity with a confusing collection of conflicting "plan document" designations clouded by plan administrator conflicts of interest. Such an approach would multiply litigation and render a uniform approach to ERISA impossible.

ARGUMENT

I. The SIP beneficiary designation Liv Kennedy waived was not a “document or instrument governing” DuPont’s Plan under the plain meaning of 29 U.S.C. § 1104(a)(1)(D).

A. While ERISA’s “prudent man” standard of care imposes traditional, common law trust fiduciary duties on administrators, it does not mandate that they ignore express, voluntary waivers of benefits.

DuPont asserts that its “Plan Documents” interpretation of 29 U.S.C. § 1104(a)(1)(D) mandates that courts ignore a divorcing spouse’s voluntary, written, attorney-negotiated, court-approved waiver of pension benefits in a property settlement agreement if that waiver conflicts with a beneficiary designation “plan document.” DuPont is wrong: beneficiary designations are not “plan documents” that “govern” plans.

1. 29 U.S.C. § 1104(a)(1)(D) is a fiduciary-duty law, not a beneficiary determination law.

A plain-meaning interpretation governs § 1104(a)(1)(D), just as it governs § 1056(d)(3)’s QDRO statute. The statute reads as follows:

§ 1104 Fiduciary duties

(a) Prudent man standard of care

- (1) Subject to sections 403(c) and (d), 4042, and 4044 [29 USC §§ 1103(c), 1103(d), 1342, and 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries:

* * *

- (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

Are beneficiary designations “documents and instruments governing the plan”? They are not.

Provisions governing payment of benefits appear in Subchapter 1, Subtitle B, Part 2, “Participation and Vesting.” Section 1104(a)(1)(D) is in Subtitle B, Part 4’s laws about “Fiduciary Responsibility.” The “fiduciary duties” and “prudent man standard of care” headings in Section 1104(a)(1)(D) are signboards that “aid in resolving an ambiguity in the legislation’s text.” *INS v. Nat’l Center for Immigrants’ Rights*, 502 U.S. 183, 189 (1991).

Section 1104(a)(1)’s “prudent man standard” arose under the common law of trusts. It addresses financial/investment matters. A provision immediately

preceding Section 1104(a) – 29 U.S.C. § 1104(a)(1)(B) – dictates that a fiduciary shall discharge ERISA responsibilities “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” Subsections address IRAs, rollovers, and plan terminations – financial, not beneficiary, issues. The terms “beneficiary,” “designation,” and “waiver” are not found in Section 1104, however.

DuPont’s “Plan Documents” Rule conflicts with provisions that expressly authorize payments to persons not on designations. A plan administrator presented with a QDRO and a demand to transfer benefits to a child or ex-spouse must pay the alternate payee designated in the QDRO rather than the beneficiary designated. And a designated beneficiary spouse with a joint and survivor annuity may waive entitlement to those benefits under 29 U.S.C. § 1055(c)(1)(A).

Pre-ERISA courts did not bar waivers or disclaimers of spendthrift trust benefits, but, instead, upheld those waivers. *See Brown v. Routzahn*, 63 F.2d 914, 917 (6th Cir.), *cert. denied*, 290 U.S. 641 (1933) (recipient’s renunciation of inheritance did not constitute a transfer). Under federal law prior to ERISA, a beneficiary under a will or trust was under no obligation to accept a legacy or gift. *U.S. v. McCrackin*, 189 F.Supp. 632, 634-37 (S.D. Ohio 1960) (holding that a son’s disclaimer/waiver was valid); Lawrence

Newman and Albert Kalter, *The Need for Disclaimer Legislation – An Analysis of the Background and Current Law*, 28 TAX LAWYER 571 (1975); and the Kennedy Merits Brief at 19-21. Extension of the “Plan Documents” Rule to include designations elevates administrators above participants and beneficiaries in violation of 29 U.S.C. § 1104(a)(1)(A)(i).

Congress did not end federal common law waiver by codifying, in 29 U.S.C. § 1104(a)(1), the “prudent man standard of care” from the law of trusts. “[I]t would be surprising, indeed,” if Congress had affected a “radical” change in the law “*sub silentio*” via “technical and conforming amendments.” *Director of Revenue of Mo. v. CoBank, ACB*, 531 U.S. 316, 323 (2001). “The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.” *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl Protection*, 474 U.S. 494, 501 (1986); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979).

When Congress wants to bar waivers, it knows how to do so – expressly rather than impliedly through something as gossamer-thin as the “Plan Documents” doctrine. 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. Without an express statutory ban, this Court has no reason to rule that Congress barred waivers *sub silentio*. “Congress...does not alter the fundamental details of a

regulatory scheme in vague terms or ancillary provisions – it does not...hide elephants in mouseholes.” *Whitman v. American Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001); *Franklin Nat’l Bank v. New York*, 347 U.S. 373, 378 (1954) (finding “no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances....”).

Other ERISA provisions, 29 U.S.C. §§ 1054-1056, govern accrual and payment of pension benefits. The Qualified Joint and Survivor Annuity (“QJSA”) statute, 29 U.S.C. § 1055, provides a spouse with an annuity benefit. The statute controlling payment of benefits is not 29 U.S.C. § 1104(a)(1)(D) but § 1056, which addresses disputes about Domestic Relations Orders (“DROs”) that “provide” (pay, supply, or transfer) benefits for “child support, alimony payments, or marital property to a spouse, former spouse, child, or other dependent of a participant.”¹ Neither 29 U.S.C.

¹ Congress was *precise* in crafting benefit payments language. *See*, 29 U.S.C. §§ 1056(d)(1) (barring alienation of benefits “provided” to others, *i.e.*, supplied or paid); 1056(d)(3)(B)(ii) (defining a DRO as “any judgment, decree, or order (including approval of a property settlement agreement) which (I) relates to the *provision* of child support, alimony payments, or marital property rights...” (emphasis supplied)); 1056(d)(3)(G) (payments to alternate payees); 1056(d)(3)(H) (segregation into separate accounts of money payable to an alternate payee “[d]uring any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise)...”); 1056(d)(3)(K) (defining a DRO

(Continued on following page)

§ 1056(d) nor § 1104(a)(1)(D) applies here because Liv's waiver did not result in participant William's "provision," payment, or transfer of SIP benefits to her. The specific, later-enacted terms of a statute override general, earlier-enacted terms. *U.S. v. Estate of Romani*, 523 U.S. 517, 532 (1998); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957). ERISA's accrual, QJSA, and QDRO laws, 29 U.S.C. §§ 1054-1056, specifically govern the accrual and payment of benefits – not 29 U.S.C. § 1104(a)(1)(D).

2. Beneficiary designations do not “govern” a plan.

In *McGowan v. NJR Service Corp.*, 423 F.3d 241 (3d Cir. 2005), *cert. denied*, 547 U.S. 1017 (2006), Judge Fuentes cautioned that,

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.

“alternate payee” as a person “having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.”).

Id. 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).

The critical terms in Section 1104(a)(1)(D) are “documents and instruments” and “governing.” A leading dictionary defines “governing document” under “Document,” subset “Governing Document.” See Bryan A. Garner (ed.), *Black’s Law Dictionary* (8th ed. 2004) at 520 and 715. *Black’s* defines a “governing document” as “[a] document that defines or organizes an organization, or grants or establishes its authority and governance.” *Id.* at 520. “An organization’s governing documents may include a charter, articles of incorporation or association, a constitution, bylaws, and rules...” That comports with 29 U.S.C. § 1102, which defines “instrument” by stating that every plan “shall be established and maintained pursuant to a written instrument.”

An ERISA “plan” instrument governs a plan by “establish[ing] and maintain[ing]” it. Designations do neither. The prudent-man standard, 29 U.S.C. § 1104(a), of which Subsection (1)(D) is a part, imposes fiduciary duties on financial and investment decision-makers. It does not direct or distribute pension benefits. Other provisions – 29 U.S.C. §§ 1054-1056 – specifically do so. ERISA’s “definitions” section, 29 U.S.C. § 1002, defines terms but not “plan instruments.” To determine what documents and instruments govern a plan, this Court turns to 29 U.S.C. §§ 1022-1025 under Subtitle B, “Regulatory

Provisions,” where the same language appears. *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (“A term appearing in several places in a statutory text is generally read the same way each time it appears.”).

The most relevant statute, § 1024, governs the “Filing and Furnishing of Information.” Subsection (a)(6) requires public filing of “any *documents* relating to the employee benefit plan, including but not limited to, the latest summary plan description...and the bargaining agreement, trust agreement, contract, *or other instrument under which the plan is established or operated.*” (Emphasis supplied). Documents and instruments “governing” a plan are those “under which the plan is established or operated,” 29 U.S.C. § 1024(b)(4):

The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary 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....*

(Emphasis supplied). Section 1024’s enumeration of governing documents and instruments does *not* include 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 was not an instrument “under which the plan is established or operated”:

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 a list of participant names is not a "document or instrument governing" a plan, neither is a designation.

Even DuPont did not view its beneficiary designations as "Plan Documents." DuPont's Plan Summary reads:

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). DuPont stated that the only "governing documents" – a variation on the terms in §§ 1104(a)(1)(D) and 1024(b)(4) – were its

plan and trustee agreement, but not beneficiary designations. And none of DuPont's designations state that they are plan documents. J.A. 34 (TRA-SOP); 56-57 (Thrift Plan); 62 (Survivor Benefits).

If this Court holds that designations are "plan documents," administrators will then have to disclose them to any participant or beneficiary who can afford a postage stamp. *See* 29 U.S.C. § 1024(b)(4) (an administrator "shall, upon written request of any participant or beneficiary, furnish a copy of...*instruments under which the plan is established or operated.*") (emphasis supplied); 29 U.S.C. § 1025(a) (an administrator shall furnish to "any beneficiary who so requests in writing" *inter alia*, "the total benefits accrued..."). Disclosing designations to everyone in the line of succession would subject participants and beneficiaries to harassment, emotional abuse and manipulation, and telemarketing. *Hughes*, 72 F.3d at 694-95. A participant's child who received no response to such a benefits letter will demand to become a beneficiary. The potential for family discord is obvious.

3. Neither ERISA nor DuPont's Plan Summary warns participants and beneficiaries that beneficiary designations are un-waivable.

Because ERISA does not define a designation as a "plan document," a plan must give participants and beneficiaries notice that the plan precludes waiver,

ambiguity, incapacity, and other challenges to designations. Under 29 U.S.C. § 1022(b), ERISA mandates disclosure of “the plan’s requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; [and] circumstances which may result in disqualification, ineligibility, or denial or loss of benefits...” DuPont did not give notice to William Kennedy that a beneficiary designation, once made, could never be waived or challenged. *See* J.A. 43-45, 48-50, 56-57, 62-63.

Review of an ERISA payment does not end with a plan’s governing documents. “We agree with the Court of Appeals that trust documents cannot excuse trustees from their duties under ERISA, and that trust documents must generally be construed in light of ERISA’s policies, *see* 29 U.S.C. § 1104(a)(1)(D)...” *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport*, 472 U.S. 559, 568 (1985). Under the common law of trusts, “[a] trustee is...expected to ‘investigate the identity of the beneficiary when the trust documents do not clearly fix such party.’” *Id.* at 572 (citing George R. Bogert & George T. Bogert, *Law of Trusts and Trustees* § 583, p. 348-49, n.40 (2d rev. ed. 1980)). DuPont’s proposed rule would excuse plan-administrators who choose to ignore waivers and elevate their convenience of administrators above their fiduciary duty to examine claims submitted on behalf of beneficiaries.

If a plan’s drafters fail to expressly warn participants and beneficiaries that the plan will never

respect a waiver or disclaimer of pension benefits, no plan administrator can later deprive a participant's executor or heirs of the inheritance they have every right to expect. Here, DuPont failed to give the notice necessary to enforce even its "Plan Documents" Rule.

B. The most well-reasoned decisions reject DuPont's notion that 29 U.S.C. § 1104(a)(1)(D) precludes courts from recognizing waivers.

"The plan-documents rule...is the minority rule. A majority of courts have concluded that 29 U.S.C. § 1104(a)(1)(D) does not govern the issue..." *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 8, 701 N.W.2d 320, 327 (2005). In *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000), the Fifth Circuit rejected the notion that § 1104(a)(1)(D) had created a "Plan Documents" Rule precluding challenges under the judge-made, federal common law of ERISA:

Section 1104 defines the fiduciary duties owed by the plan administrator to plan participants and beneficiaries. That section does not either expressly or implicitly purport to establish any methodology for determining the beneficiary of an ERISA plan or for resolving competing claims to insurance proceeds. Thus, considered in isolation, § 1104(d) is a very thin reed upon which to find complete conflict preemption with respect to competing claims to life insurance proceeds....[T]he Sixth Circuit's bright line rule that a beneficiary designation cannot be

challenged would supplant what is a fairly uniform set of state laws providing that a named beneficiary who kills a plan participant in order to obtain the plan benefits is not entitled to recover those proceeds...ERISA is broad enough in its preemptive scope....There is no additional need to breathe imaginary preemptive effect with respect to competing claims for life insurance benefits into general provisions addressing another topic altogether.

Manning, 212 F.3d at 872.

DuPont's "Plan Documents" Rule would run roughshod over the collective wisdom of countless courts and at least 45 legislatures that have recognized that the vast majority of people do not choose to enrich ex-spouses at the expense of their children and other heirs. *See Kennedy Merits Brief* at 59-63. Since this Court considers the number of states banning same-sex intimacy and enforcing the death penalty in constitutional cases, this Court should also consider the collective wisdom of 45 legislatures when determining federal common law. *See, e.g., Manning*, 212 F.3d at 871. Disputes between beneficiaries arise because divorcing spouses reasonably place their trust in the enforceability of the express, written waivers their spouses sign in court – decisions approved of for decades by a large majority of this nation's courts. Continued recognition of a waiver rule under the federal common law – rather than repudiation of long-standing ERISA waiver precedent – comports with this Court's presumption favoring

the continuation of judge-made law. *Midlantic*, 474 U.S. at 501.

Rejection of DuPont’s proposed “Plan Documents” Rule would not conflict with *Egelhoff v. Egelhoff*, 532 U.S. 141, 147-48 (2001) and *Boggs v. Boggs*, 520 U.S. 833 (1997), where state statutes overrode plan beneficiary-status. Neither case concerned a knowing, voluntary waiver of a beneficiary designation under federal common law.

II. Application of DuPont’s “Plan Documents” Rule to beneficiary designations would result in absurd and adverse consequences.

A. Treating beneficiary designations as “Plan Documents” when they are not, and precluding federal common law enforcement of voluntary, written waivers, conflicts with Congress’ effort to create a uniform, federal common law of ERISA including judicial consideration of all relevant evidence.

DuPont’s “Plan Documents” Rule, which trumps a voluntary, written waiver, would thwart ERISA’s policy of fostering a uniform, federal common law of ERISA. This Court can create a uniform federal ERISA rule of waiver consistent with dozens of this Court’s decisions by holding that a party enforcing an express waiver in a written divorce decree or property settlement must prove “a voluntary relinquishment of

a known right” under RESTATEMENT OF CONTRACTS (SECOND) § 84 comment b (1981).

The Restatement’s rule of voluntary waiver is simple and clear. Judicial enactment of DuPont’s “Plan Documents” Rule would replace such a uniform national standard with a welter of thousands of conflicting “plan document” approaches, increasing administrator uncertainty while multiplying costly litigation at the expense of plans, participants, and beneficiaries.

Real world plan administrators can never limit their gaze solely to beneficiary designations. To carry out their fiduciary duties, they must always examine QDROs, QPSAs, QJSA spousal-consent forms, birth and death certificates, adoption papers, common law marriage affidavits, and the statutes and precedent of states recognizing same sex marriages and unions. *See Kennedy Reply Brief at 28-31.*

DuPont justifies its “Plan Documents” Rule on the grounds that only lawyers can determine whether a waiver is voluntary. DuPont ignores real world waivers. Hundreds of thousands of non-lawyers – *e.g.*, police officers, deputies, constables, and justices of the peace – decide whether a suspect’s waiver of *Miranda* rights is knowing and voluntary millions of times a year. Nurses and hospital personnel decide whether a patient seeking medical care has voluntarily waived rights through consent forms. Waivers of jury trial are common place.

Judicial repudiation of waivers based solely on the penumbra of 29 U.S.C. § 1104(a)(1)(D) would undermine respect for waivers under federal law – including ERISA-related waivers of liability incidental to medical care, the exercise of HIPAA privacy rights, and the receipt of COBRA insurance payments.

Precluding judicial review of beneficiary designations would incentivize divorcing spouses to commit fraud during settlement negotiations. Unscrupulous attorneys would have reason to encourage a divorcing client to sign a waiver to secure desired property, while suggesting that the client later cheat, retreat, and repudiate the waiver.

Given the clarity of Liv's and William Kennedy's agreement about Liv's waiver of all right, title, interest in and claim to William's 401k benefits at DuPont, William's elimination of Liv as beneficiary in the one DuPont plan not covered by the divorce decree or the one QDRO both divorces executed, and the absence of any remarriage, there is no reasonable doubt that William expected Liv to waive any claim to his 401k benefits. *See Kennedy Merits Brief* at 40-43. Long-established precedent requires enforcement of beneficiary designations in accord with the reasonable expectations of the participant. *See Gallagher v. Reliance Standard Life Ins. Co.*, 305 F.3d 264, 269 (4th Cir. 2002).

DuPont's proposed rule would privatize ERISA's payment provisions without congressional authorization and delegate vast, largely-unchecked power to administrators. A decision focusing solely on a beneficiary designation would deprive courts of their traditional power to render justice based on all relevant evidence.

Must future courts ignore ambiguous "plan documents" or designations that confuse or confound participants, beneficiaries, and judges? What if the boxer George Foreman – all of whose five sons are named George Foreman – identifies "George Foreman" as his sole beneficiary without specifying which George should receive his benefits?

What if the participant designates his lawyer as his sole beneficiary, at the expense of his minor children? Does the "Plan Documents" Rule preclude a court from invalidating a designation based on self-dealing?

How about spouse-slayers and parricides? Does the slayer profit merely because his name appears on a designation?

Must a court stand mute while a plan-administrator pays pension proceeds to someone who is incompetent or *non compos mentis* beneficiary?

DuPont's expansion of the Plan Documents Rule to beneficiary designations would wreak havoc on the Treasury's acceptance of disclaimers and waivers under Section 2518(b) of the Internal Revenue Code,

Treasury's regulations, and state law. *See* I.R.S. GEN. COUNSEL MEM. 39,858, 1991 WL 776304 (Sept. 23, 1991); United States' *Amicus* Brief at 18. DuPont's rule subordinates waivers and disclaimers to plan "documents" Congress never defined as such while denying those who rely on waivers meaningful judicial review.

B. DuPont's "Plan Documents" Rule would reward children and spouses who slay their participant parents and spouses.

By precluding any challenge to an on-file beneficiary designation, DuPont's "Plan Documents" Rule would preclude courts from exercising their federal common law power to deny benefits to children and spouses who murder participant parents and spouses. *Keen v. Weaver*, 121 S.W.3d 721, 726 n.4 (Tex. 2003). *See* Kennedy Merits-Brief at 60-63. It is difficult to believe that the 1974 Congress that enacted ERISA – a Congress highly critical of corporate power, the Vietnam War, and President Nixon – created a "Plan Documents" statute that so radically recast trust, probate, and estate law without expressly signaling that intent.

III. DuPont’s Plan Administrator breached the Plan’s 29 U.S.C. § 1104(a)(1)(B) fiduciary duty to the Estate by failing to consider the divorce decree waiver, despite DuPont’s prepayment receipt and maintenance of those papers as “a record of DuPont with regard to the SIP account...with other DuPont records relating to Mr. Kennedy’s SIP account....”

If the “Plan Documents” Rule ensures that a plan has all relevant papers necessary to make a benefits-determination, the Estate satisfied that purpose here. DuPont’s Plan Administrator, Mary Dineen, had everything a reasonable person would need under 29 U.S.C. § 1104(a)(1)(B) to recognize a dispute between contending beneficiaries. Ms. Dineen failed to consider the voluntary waiver in the Kennedy divorce decree, despite her receipt of the Estate’s demand letter and its copy of that divorce decree. She was “not qualified to provide a legal interpretation” as a non-lawyer, she testified, and was “not authorized to secure a legal interpretation from any legal service or law firm other than the DuPont Legal Department.” J.A. at 73. Ms. Dineen never stated that she had asked the DuPont Legal Department benefits lawyer for an opinion.

Ms. Dineen swore that she maintained those papers as “a record of DuPont with regard to the SIP account...with other DuPont records relating to Mr. Kennedy’s SIP account....” She failed to recognize conflicting claims or file the interpleader most

administrators would have filed. See Kennedy Reply Brief at 31-33; *Atwater v. Nortel Networks, Inc.*, 388 F.Supp.2d 610, 616 (M.D. N.C. 2005) (administrator liability for paying proceeds to a participant's husband after his indictment for her murder but prior to his conviction); *Metro. Life Ins. Co. v. Hamm*, 2003 U.S. Dist. LEXIS 19839, 2003 WL 22518183, *5 (E.D. Pa. 2003) (an interpleader action was appropriate although the slayer-beneficiary had "not been arrested, formally charged, or convicted of homicide"); *Metro. Life Ins. Co. v. Bigelow*, 283 F.3d 436, 442 (2d Cir. 2002) (allowing interpleader to determine the proper beneficiaries).

By doing what was merely "convenient" rather than what was right, DuPont's Plan Administrator wrongfully paid pension benefits to an ex-spouse who had voluntarily and expressly waived them in court.

CONCLUSION

Petitioner Kari 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.

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