

TO: FAMILY LAW PRACTITIONERS

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**SUPREME COURT RULES DIVORCE DECREE WAS NOT A WAIVER OF
RETIREMENT BENEFITS**

On January 26, 2009, the Supreme Court of the United States ruled that a divorce decree did not waive an ex-spouse's rights to retirement benefits if the beneficiary designation remained unchanged post divorce and named the ex-spouse as the beneficiary. *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, No. 08-636. The opinion of the Court changed the advice we provide to clients regarding when a qualified domestic relations order is necessary and what a participant must do to legally change their beneficiary from their ex-spouse to a new beneficiary.

The *Kennedy* case involved a relatively common problem that occurs upon the death of retirement plan participant. Liv and William Kennedy were married in 1971, and William Kennedy completed a beneficiary designation form naming his first wife Liv as the beneficiary of his retirement benefits upon his death. The parties subsequently divorced in 1994 pursuant to a divorce decree which stated that Liv "is divested of all right, title, interest, and claim in and to [a]ny and all sums . . . the proceeds [from], and any other rights related to any . . . retirement plan, pension plan, or like benefit program existing by reason of [William's] past or present future employment." App. To Pet. For Cert. 64-65.

After the divorce was final, William did not change the beneficiary designation form. William subsequently died. Upon William's death, the plan administrator distributed all of the benefits to Liv because William's beneficiary designation form still named Liv as the beneficiary. William's estate subsequently sued the plan for reimbursement of the benefits, claiming that Liv waived her rights to the benefits in the divorce decree and, therefore, Liv should not have received any of the benefits.

In ruling in favor of the plan, the Supreme Court held that a plan administrator is only required to look at the formal plan documents in order to determine who is the correct recipient of retirement benefits and that a Marital Settlement Agreement was not a governing plan document for this purpose. In this regard, the Court stated that "the plan provided a way to disclaim an interest in the SIP account, but Liv did not purport to follow it." The Court ruled that a plan administrator is not responsible for looking at a divorce decree because that could require the plan administrator to research the existence of a "multitude of external documents"; therefore, a waiver of benefits in a divorce decree is not valid.

AFTER *KENNEDY*, WHEN IS A QUALIFIED DOMESTIC RELATIONS ORDER REQUIRED?

The Court in *Kennedy* further clarified that even a qualified domestic relations order would not be a valid waiver of benefits. The Court stated:

In fact, a beneficiary seeking only to relinquish her right to benefits cannot do this by a QDRO, for a QDRO by definition requires that it be the “creat[ion] or recogni[tion of] the existence of an alternate payee’s right to, or assign[ment] to an alternate payee [of] the right to, receive all or a portion of the benefits payable with respect to a participant under the plan.

In other words, a QDRO which merely awards all of the benefits to the participant and waives the right of an alternate payee to receive benefits will not be a valid waiver of benefits. If the participant still fails to remove the ex-spouse from the beneficiary designation form and the participant dies with the ex-spouse named on the form, the plan administrator will pay the benefits to the ex-spouse regardless of what the QDRO states.

For this reason, the *Kennedy* opinion has clarified when a qualified domestic relations order is required. A qualified domestic relations order is required for a plan if the parties are assigning any benefits in that plan to the non-participant spouse. If the divorce decree states that the participant is to keep 100 percent of his or her retirement benefits as his or her sole and separate property, no qualified domestic relations order is required, but a change to the beneficiary designation form is essential.

AFTER *KENNEDY*, HOW CAN A PARTICIPANT BE SURE THAT THE EX-SPOUSE WILL NOT WRONGFULLY RECEIVE ANY RETIREMENT BENEFITS?

The most important lesson to be learned from the *Kennedy* case is that the beneficiary designation form must state the intended beneficiary. The divorce decree should list all of the retirement plans and state clearly which plans will go to which party, but most importantly, the participant spouse must fill out a new beneficiary designation form naming a new beneficiary other than the ex-spouse. Pursuant to *Kennedy*, if the divorce decree awards all of the retirement benefits to the participant, but the participant fails to change the beneficiary designation form to name a new beneficiary, the retirement benefits will be paid to the ex-spouse when the participant dies.

It should be noted that even in the situation in which the parties agree to divide a plan 50 percent, the participant should still name a new beneficiary on the beneficiary designation form to the extent of his or her share so that the new beneficiary will receive the participant’s 50 percent when the participant passes away.

WHAT CAN BE DONE IF THE PARTICIPANT FAILS TO CHANGE THE BENEFICIARY DESIGNATION FORM AND THE PLAN ADMINISTRATOR DISTRIBUTES THE FUNDS TO THE EX-SPOUSE?

The Court's opinion in *Kennedy* states in footnote 10, "we do not express any view as to whether the Estate could have brought an action in state or federal court against Liv to obtain the benefits after they were distributed." Footnote 10 instructs that the reader compare *Boggs v. Boggs*, 520 U.S. 833, 853 (1997) to *Pardee v. Pardee*, 112 P.3d 308, 313-314 (2005), which held that ERISA did not preempt enforcement of allocation of ERISA benefits in a state-court divorce decree as "the pension plan funds were no longer entitled to ERISA protection once the plan funds were distributed."

For this reason, although the plan administrator is required to pay the benefits to the person named on the beneficiary designation form, a private right of action may exist in state court to reclaim the benefits from the ex-spouse. This is a costly process for the participant or his or her estate, so the best advice a family law attorney can render would be a warning to the participant to execute a new beneficiary designation designating the participant's desired recipient of plan death benefits.

"QUASI MARRIAGE" CREATES RIGHTS TO RETIREMENT BENEFITS IN QDRO

In a 2-1 split decision, the Ninth Circuit ruled on January 12, 2009, that a woman who had a "quasi marital" relationship for 30 years was entitled to receive a portion of the participant's retirement benefits pursuant to a QDRO. *Owens v. Automotive Machinists Pension Trust*, 9th Cir., No. 07-35253.

A state court found that Norma Owens maintained a "quasi marital" relationship with Phillip Owens based on Washington state domestic law. The state court ordered that 50 percent of the retirement benefits be paid to Norma; however, the plan refused to accept the state court order. The Plan argued that the court order was not a valid QDRO because it did not relate to "marital property rights" since Norma and Phillip only had a "quasi marital" relationship. Norma Owens sued for declaratory relief in district court.

The Ninth Circuit, in agreeing with a lower federal court, ruled that a QDRO can be entered for a "quasi marital" relationship. The Ninth Court stated that Norma qualified as an "alternate payee" not because she was a former spouse, but because she was an "other dependent" of Phillip based on the fact that she shared a home with Phillip and devoted her time to caring for Phillip and their children.

Butterfield Schechter ♦ LLP is San Diego County's largest law firm focusing its practice primarily on employee benefit plan matters. As part of our overall Employee Benefits/ERISA practice, our firm has significantly enjoyed working with a large number of local family law attorneys and their clients on QDRO, employee benefits plan, and ERISA related issues. We have extensive experience in:

- Analyzing and valuing the community property in retirement plans, including, but not limited to:
 - 401(k) Plans, Profit Sharing Plans
 - IRAs
 - traditional pension plans
 - stock option plans and other executive compensation plans
 - disability pensions and severance benefits
- Drafting QDROs to divide these benefits

If you have any questions regarding any of the items addressed herein, or any employee benefits plan or QDRO issue, please do not hesitate to call, write, or e-mail us. We appreciate the opportunity to be of service to your clients in these areas.

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