# *Kennedy v. Dupont Savings & Investment Plan*: Waiver of Retirement Benefits in Light of a Recent Supreme Court Decision

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Today, retirement accounts are often one of an individual's most valuable assets. Consequently, division of retirement benefits is nearly always an important part of negotiations during a matrimonial matter. Unfortunately, division of retirement benefits will not be controlled merely by the settlement between the parties but also by the very complex world of ERISA, the Employee Retirement Income Security Act.

If retirement benefits are to be split between the parties upon divorce, matrimonial practitioners know to use Qualified Domestic Relations Orders ("QDROs") to ensure that clients receive the negotiated share of retirement benefits. However, if there is an agreement between the parties not to divide one or more sources of retirement benefits, the common practice has been to include a waiver of the retirement benefits in the separation agreement or on the record, and often leave it at that. A recent Supreme Court decision, *Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan*,[1] is a reminder of the need to be attentive to the rules of ERISA, where division of retirement benefits is involved. The U.S. Supreme Court determined that waivers of benefits contained in otherwise legally binding documents, such as separation agreements, do not have to be honored by an ERISA plan if they conflict with valid beneficiary designations on file with the plan.

## The *Kennedy* Fact Pattern

In *Kennedy*, the decedent had money in two separate qualified retirement plans, one of which was the DuPont Savings and Investment Plan. The ex-wife had originally been named as the beneficiary for both plans, but in the divorce settlement she waived all rights to benefits under either plan. After the divorce was finalized, the decedent changed the beneficiary designation on one plan, but failed to change the beneficiary designation for the Savings and Investment Plan. After Mr. Kennedy's death, both plans paid the benefits according to the on-file beneficiary designations, with the Savings and Investment Plan benefits being paid to the ex-wife. The daughter, as executrix of her father's estate, sought to recover the Savings and Investment Plan benefits. At the heart of the case was the question of whether the ex-wife's waiver contained in the divorce settlement could trump the beneficiary designation on file naming her as the beneficiary.

The U.S. Supreme Court held that the Savings and Investment Plan Administrator had fulfilled its fiduciary duty by paying the benefits to the former spouse because she was the designated beneficiary under the documents on file with the Plan, despite the fact that this designation was contrary to the parties' negotiated settlement. The Court grounded its decision in the need to keep plan administration simple and on a straightforward reading of the statute. Under ERISA, a qualified retirement plan is required to have a written plan document, and fiduciaries are required to act in accordance with that plan document. Because the divorce settlement was not recognized by the Plan document as a means to change the beneficiary designation or to waive benefits, the Plan was not required to honor the waiver.

The Court went on to say that the waiver could not have been achieved by filing a QDRO with the Plan. According to the Court, in order for a domestic relations order to be a qualified domestic relations order, or QDRO, the order must create or recognize another payee's right to the benefits. Therefore, a QDRO could not be used in a situation such as Kennedy's, where the only intent of the order would be for the ex-wife to waive benefits. According to the Court, the only way for the parties' negotiated deal to have been carried out in this situation would have been for Kennedy to change the beneficiary designation on his account or the ex-wife to waive benefits under a mechanism provided by the Plan. Since neither of these was done, the Plan Administrator was correct in disregarding the divorce settlement and paying the benefits to the former wife. This was true even though the Court found that the waiver in the divorce settlement was not in violation of ERISA's anti-alienation provision and was therefore otherwise valid.

## The Possibility of a Post-Distribution Remedy

The Court's decision leaves open the possibility of recoupment from the ex-spouse, since the question decided is limited to a plan fiduciary's obligations, not the ex-spouse's contractual requirements. Circuit decisions on this point have been mixed.

This question had been considered by some federal circuits even before *Kennedy*. The Seventh, Ninth, and Fourth Circuits have held that a constructive trust remedy is not available to plaintiffs seeking to recover ERISA benefits paid to designated beneficiaries allegedly in violation of divorce agreements. The Sixth Circuit, on the other hand, permits constructive trusts to be imposed on the proceeds of ERISA benefits after those benefits have

been distributed according to plan documents. The Ninth Circuit's decision in *Carmona*, however, may be reviewed in light of the *Kennedy* decision. A request for a rehearing *en banc* has been submitted and is under consideration.

Consequently, the availability of the constructive trust remedy is still very much open to debate. Ultimately, allowing such post-recovery action seems to be the most logical interpretation of the Court's bifurcated holding that the waiver did not violate ERISA but Plan fiduciaries do not need to honor it. It also would serve the purpose of simplifying plan administration while simultaneously allowing the negotiated settlement between the parties to determine the ultimate distribution of assets between them. However, whether New York and the Second Circuit will agree with this reasoning is yet to be seen.

Even if New York and the Second Circuit do allow a constructive trust remedy, however, this may be a hollow option. In the *Kennedy* case, for example, the ex-wife had already spent the money, making recovery difficult. In addition, pursuing an action against a former spouse is an additional cost that can be avoided if a matrimonial attorney and his or her client take appropriate steps to ensure that the plan pays the money to the appropriate party in the first place.

## What to Do in the Post-*Kennedy* World

Attorneys advising clients in this situation need to stress the importance of changing the beneficiary designation on the retirement benefits, if a waiver of benefits has been part of the negotiated settlement. In addition, the attorney should remind the client that if he or she has money in multiple plans, even with the same employer, multiple beneficiary designation forms will generally need to be changed. Indeed, given the importance of retirement assets to the overall net worth of clients these days, failing to give this advice could open up an attorney to a claim of malpractice.

In addition, if one spouse will be waiving benefits, the attorney should make inquiries as to whether there is a specific method for waiving benefits under the plan. While changing the beneficiary designation may be sufficient in some cases, in other cases where joint and survivor annuities are involved, the former spouse may have rights that cannot be waived without extra steps. The attorney should contact the plan to inquire about the proper procedures, and consider consulting a specialist in the retirement benefits field who can assist them with navigating through the ERISA world.

## Endnote

1. 129 S. Ct. 865 (2009).

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*Editor's Note:* The practitioner should be most careful in drafting marital or nuptial agreements to comport with this new change.

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