Bloomberg BNA

Tax Management
Compensation Planning Journal™

In the Pursuit of Domestic Tranquility — Matrimonial Attorneys Should Follow The Bouncing Beneficiary Designations*

By Andrew L. Oringer and Albert Feuer[1]

INTRODUCTION

In 2009, the Supreme Court, in *Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan*,[2] addressed the proper identification of beneficiaries under plans governed by the Employee Retirement Income Security Act of 1974, as amended (ERISA). *Kennedy* identifies the ''plan documents'' rule (Plan Documents Rule) as the legal doctrine that controls the inquiry regarding beneficiary identification for ''pension plans'' and ''welfare plans'' governed by ERISA.[3] The Plan Documents Rule presents an extremely bright-line standard for identifying to whom the plan administrator must pay plan benefits. Generally, the inquiry starts and stops with the identification of who is designated as the applicable beneficiary under and in accordance with the terms of the governing plan. However, *Kennedy*, in a footnote, raised a question as to whether a claimant may have a cause of action against a named beneficiary to whom benefits have been paid in accordance with the governing plan documents.

The point of this Article is neither to endorse nor criticize *Kennedy's* adoption of the Plan Documents Rule or any other aspect of the case.[4] Rather, the point is to identify, in light of *Kennedy*, the risks and poten-

[1] Andrew L. Oringer is a partner in, and the co-chair of, the Employee Benefits and Executive Compensation Department at Dechert LLP. Albert Feuer is the principal attorney in the Law Offices of Albert Feuer, whose practice focuses on employee benefits, executive compensation and trusts and estates, and related tax issues. The authors gratefully acknowledge the assistance of Aaron Soo Cha, a law clerk at Dechert LLP, in the preparation of this article.

[2] 555 U.S. 285 (2009).

[3] Other cases that are worthwhile to review if one wants a more extensive understanding of the Court's jurisprudence that may be of relevance to the issues considered here include *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988) (ERISA does not preempt generally applicable state-law levies); *Boggs v. Boggs*, 520 U.S. 833 (1997) (ERISA does not permit state community-property statutes to be used to divest plan benefits from the beneficiary of an ERISA-covered plan); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) (ERISA does not permit state revocation-of-divorce statutes to be used to divest plan benefits from the beneficiary of an ERISA-covered plan); *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003) (exception for insurance laws from ERISA's preemptive reach is limited to state laws that (1) are specifically directed toward entities engaged in insurance and (2) substantially affect the risk-pooling arrangement between the insurer and the insured); *see also Hillman v. Maretta*, 133 S. Ct. 1943 (2013) (state laws may not be used to divest plan benefits from a beneficiary named in accordance with the express beneficiary-designation provisions of the Federal Employees' Group Life Insurance Act of 1954).

[4] For further discussion of *Kennedy*, see Albert Feuer, *Did a Unanimous Supreme Court Misread ERISA and Its Own Prec-*

ISSN 0747-8607

tially disastrous consequences of a failure to attend to beneficiary designations, and the remarkable ease with which, with simple action, those risks can essentially be eliminated.[5] The issues here are exacerbated by the fact that, by the time the issues become apparent, the participant is generally, by hypothesis, deceased and therefore not present or otherwise able to correct the situation. The problems in question can easily be addressed by taking remarkably simple steps to update beneficiary designations, although one would still need to be aware that there are steps that need to be taken.

The potential trouble that may arise from a failure to attend to these simple steps cannot be overstated. The difficulties resulting from such a failure are made all the more frustrating by the simplicity with which these issues can be successfully addressed. Further, the participant's intentions regarding these matters are those of a person who, by hypothesis, is no longer around to clarify the intended recipient of the payment of survivor benefits, which can be a substantial part of the resources/wealth/security for the intended beneficiary. Without the legitimately expected funds, the beneficiary could go from comfortable to destitute.[6] While ultimate recovery is, as shall be seen, not necessarily impossible, why should the intended beneficiaries have to incur the uncertainty, expense, delay and conflict of a lawsuit?

This Article will review the Court's approach in *Kennedy*, consider the potential reach and breadth of the issue and discuss the approach taken in various post-*Kennedy* cases. Next, simple but critical steps relating to identifying the intent of the parties and conforming the applicable beneficiary designations to that intent will be identified.[7] The authors' hope is that domestic-relations attorneys, with a greater awareness of these issues, will take these simple steps so that the intention of the parties in matters of such enormous importance to participants and their families and friends will not be needlessly scuttled.

KENNEDY AND ITS PROGENY

Background — ERISA's Anti-Alienation Rules

ERISA §206(d) (and the corresponding provisions of the tax code) contains an extremely broad prohibition against the alienation of benefits under ''pension plans'' governed by ERISA (and, in the case of the tax code, tax-qualified plans). ERISA's anti-alienation rules do not apply to ERISA-covered ''welfare plans.''[8]

Payments of pension benefits under domestic-relations orders to someone other than the plan participant or beneficiary would generally be treated as prohibited alienations.[9] However, an individual who obtains rights from a domestic-relations order that is a

---

edents, Undermine Basic ERISA Principles, and Encourage Benefits Litigation? 37 Tax Mgmt. Comp. Plan. J. 247.

[5] The discussion in this Article is not the first to identify the importance of the matters considered herein. *See, e.g.,* Leslie A. Shaner, *When Clients Fail to Change Beneficiary Designations*, Family Lawyer Magazine (Dec. 10, 2013), http://www.familylawyermagazine.com/articles/beneficiary-designations; *see also* Wendy O. Hickey, *Help Your Clients Avoid Easy Post Divorce Mistakes*, Family Law Newsletter (Nov. 15, 2012), http://www.bostonbar.org/sections/family-law/family-law-newsletter/2012/11/15/family-law-newsletter-fall-2012-help-your-clients-avoid-easy-post-divorce-mistakes (''A simple post divorce reminder letter to your client highlighting some of the things they should do to protect themselves and their estates in the future, including changing beneficiary designations where proper, may prompt a client to do so which could very well prevent future litigation for the client's probate estate . . . A simple reminder to your client can help ensure his/her kids do not have to face the added stress of having to sue their remaining parent in the event of an untimely death of the other parent.''); Paula A. Calimafde & Jessica B. Summers, *Six Worst Mistakes to Make with Beneficiary Designations*, Best Lawyers, http://www.bestlawyers.com/Article/six-worst-mistakes-make-beneficiary-designations/57/ (''When there is divorce or death in the family, beneficiary designations are likely not at the forefront of a client's [mind]. Clients should review their designations following such major life events to ensure they still work properly. Clients should not assume that an external document will be sufficient to alter an outdated beneficiary designation.''). *See generally* Albert Feuer, *Determining the Death Beneficiary Under an ERISA Plan and the Rights of Such a Beneficiary*, 54 Tax Mgmt. Memo. 323 (Aug. 26, 2013) (discussing beneficiary issues in general); Albert Feuer, *When Does a Domestic Relations Order Determine the Disposition of ERISA Plan Benefits?* 36 Tax Mgmt. Comp. Plan. J. 91 (May 2, 2008) (generally discussing domestic relations orders and their potential effect on the disposition of plan benefits).

[6] The case of *Amschwand v. Spherion Corp.*, 505 F.3d 342 (5th Cir. 2007), *cert. denied*, 554 U.S. 932 (2008), involving a misunderstanding by both a plan fiduciary and a plan participant regarding the relevance to plan participation of continuing ''employee'' status, while not on point to the discussion here, is an example of a situation that shows the potentially devastating nature of a footfault regarding anticipated entitlement to life insurance benefits. (Query whether the result in *Amschwand* would have been different after the Court's surcharge discussion in *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011)).

[7] Because the basic premise of this Article is that beneficiary designations should be conformed to the intent of the parties and the applicable non-plan documentation, issues relating to whether and how a beneficiary is able to effect a waiver of a benefit that is otherwise about to be paid (as distinguished from a waiver by a beneficiary in prior non-plan documentation, the reach of which waiver the beneficiary may later be trying to avoid) are not generally addressed herein. *See also* below n. 16 (referring to discussion of the issue in *Kennedy*).

[8] *See also* below n. 26.

[9] ERISA §206(d)(3); *see also* §401(a)(13) and §414(p) of the Internal Revenue Code of 1986, as amended (I.R.C.). Note that state law is generally not preempted in the case of a QDRO. *See*

ISSN 0747-8607

''qualified domestic relations order'' (QDRO) under ERISA (or the corresponding provisions of the tax code) is treated as a beneficiary for those purposes.[10] QDROs are state-law judgments, decrees and orders that relate to the provision of child support, alimony payments or marital-property rights to a spouse, former spouse, child or other dependent of a participant that meet a fairly extensive list of specific requirements.[11] ERISA ''pension'' plans are required to provide for the payment of benefits in accordance with the applicable requirements of a QDRO.[12]

Before *Kennedy*, a number of courts had concluded that the question of whether a waiver of pension benefits is valid depends on whether the waiver was effected under a valid QDRO. Under this view, if the waiver were not under a QDRO in accordance with all applicable QDRO rules, it could be viewed as a prohibited alienation. Indeed, as discussed below, one of the courts taking this approach was the Fifth Circuit in the *Kennedy* case.[13]

The Plan Documents Rule Under *Kennedy*

In *Kennedy*, William Kennedy, a participant in the DuPont Savings and Investment Plan (DuPont Plan), had in 1974 designated his then-wife, Liv Kennedy, as his sole beneficiary. William and Liv divorced in 1994 pursuant to a decree stating that Liv was ''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 or future employment.'' William did not, however, execute a new beneficiary form designating an individual other than Liv as the beneficiary under the DuPont Plan.[14]

Following William's death in 2001, his estate's personal representative requested a distribution of his DuPont Plan benefits. The DuPont Plan administrator instead distributed the benefits to Liv in accordance with the unchanged beneficiary designation from 1974. William's estate sued, claiming that the divorce decree amounted to a waiver of the DuPont Plan benefits and that under the terms of the plan, no benefits should have been distributed to Liv.

The Fifth Circuit, relying heavily on the ''anti-alienation'' provision under ERISA §206(d), held that Liv's waiver constituted a prohibited assignment or alienation of her interest under the DuPont Plan to William's estate. Because the *Kennedy* divorce decree did not meet the strict requirements for QDROs, the DuPont Plan benefits, according to the Fifth Circuit, were required to be paid to the designated beneficiary on file.

The Fifth Circuit decision highlighted a split in the circuits, and the Supreme Court granted certiorari. The Court took a different approach than the Fifth Circuit and held that, fundamentally, Liv's waiver did not constitute an assignment or alienation subject to the ERISA anti-alienation provision (and the related QDRO rules). Rather, the Court viewed the waiver as nothing more than that — a waiver. In this regard, the Court characterized a waiver as not automatically giving plan benefits to another beneficiary.[15]

Viewing the waiver in this way, the Court in deciding *Kennedy* identified the Plan Documents Rule (rather than the QDRO and other rules governing the alienation of ''pension'' benefits) as the controlling rule,[16] citing to ERISA §404(a)(1)(D), which, as relevant here, requires a plan administrator to act ''in ac-

---

ERISA §514(b)(7). *See generally* Albert Feuer, *How the Supreme Court and the Department of Labor May Dispel Myths about ERISA's Family Law Provisions and Protect the Benefit Entitlements That Arise Thereunder*, 45 J. Marshall L. Rev. 635, 741–45 (2012), http://ssrn.com/abstract=2154053.

[10] ERISA §206(d)(3)(J); I.R.C §401(a)(13)(B).

[11] It is not entirely clear whether alienations under state-law domestic-relations orders would be valid in the absence of the QDRO provisions set forth under ERISA's anti-alienation rules. *See generally* Albert Feuer, *When Do State Laws Determine ERISA Plan Benefit Rights?* 47 J. Marshall L. Rev. 145, 252–258 (2013), http://ssrn.com/abstract=2440008 (arguing that, prior to the enactment of the QDRO provisions, ERISA permitted state domestic relations orders as a result of the Supreme Court's early ERISA preemption decision in the case of *Campa v. Campa*, 89 Cal. App. 3d 113 (App. 1st Dist. 1979) (appeal rejected by the Cal. Sup. Ct.), *appeal dismissed* sub nom., *Carpenters Pens. Trust Fund for N. Cal. v. Campa*, 444 U.S. 1028 (1980)); *see also* below n. 45 (discussing that certain other possible alienations may be valid notwithstanding ERISA's broad anti-alienation proscription).

[12] ERISA §206(d)(3)(A).

[13] *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 497 F.3d 426 (5th Cir. 2007), *aff'd*, 555 U.S. 285 (2009). Unless otherwise indicated by the context, references herein to *Kennedy* are to the Supreme Court's decision in the case.

[14] It is noted that after the divorce William had executed a new beneficiary designation under another ''pension'' plan not at issue in the case. 555 U.S. at 289.

[15] *But see* Albert Feuer, *Did a Unanimous Supreme Court Misread ERISA and Its Own Precedents, Undermine Basic ERISA Principles, and Encourage Benefits Litigation?* 37 Tax Mgmt. Comp. Plan. J. 247, 258 (Oct. 2, 2009).

[16] Domestic-relations attorneys who have failed to appreciate this particular nuance are not alone. Not only did the Fifth Circuit (and, one might suspect, any number of ERISA experts) focus on ERISA's anti-alienation and related QDRO rules in analyzing benefit waivers, but the Court itself seems to have proceeded likewise. The Supreme Court initially granted certiorari to answer the question, ''Was the Fifth Circuit correct in concluding that ERISA's Qualified Domestic Relations Order provision, 29 U.S.C. §1056(d)(3)(B)(i) [ERISA §206(d)(3)(B)(i)], is the only valid way a divorcing spouse can waive her right to receive her ex-husband's pension benefits under ERISA?'' 552 U.S. 1178 (2008). The *Ken-*

ISSN 0747-8607

cordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of ''Title I of ERISA.'' Because the DuPont Plan documents provided that plan benefits would be payable to designated beneficiaries, and because Liv was the designated beneficiary on record, the distribution to Liv was, quite simply, the proper one.

The Court noted that this bright-line Plan Documents Rule would provide certainty and administrative ease for plan administrators, noting further that the plan documents serve the purpose of establishing uniform procedures to guide the processing of claims and the disbursement of benefits.[17] This focus on the plan terms is consistent with the Supreme Court's recent statement that the ''focus on the written terms of the plan is the linchpin of a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [welfare benefits] plans in the first place.''[18] *Kennedy* can be seen as a decision that is part of a general trend in the Court to defer to the terms of the plan document (at least absent a statutory provision to the contrary). As the Court has stated, ''The plan, in short, is at the center of ERISA.''[19]

It can therefore be seen that the Supreme Court ultimately came to the same conclusion as the Fifth Circuit, but for different reasons. While the Fifth Circuit's and the Court's respective holdings were to the same effect — that is, the benefits in question were required to be paid to the designated beneficiary under the terms of the DuPont Plan[20] — the difference in rationales is critical to the reach of the decision. As discussed further below,[21] the Court's rationale, by focusing on the Plan Documents Rule (applicable to both pension and welfare plans that are subject to ERISA) rather than on the ERISA anti-alienation rule (applicable only to ''pension'' plans), is not limited to retirement plans. The reasoning applies with equal force to any plan subject to ERISA, including ERISA-covered life insurance, disability, and other plans.

Critically, for purposes of the concerns being raised in this Article, the Court in footnote 10 of its decision, left open the possibility that the participant's estate may have been able to enforce a claim against Liv for the DuPont Plan benefits that Liv had been paid.[22] The Supreme Court cited to *Sweebe v. Sweebe*,[23] which held that while a plan administrator must pay benefits as required by ERISA, after the distribution is made, ''the consensual terms of a prior contractual agreement may prevent the named beneficiary from

---

nedy oral argument is replete with acknowledgments from various members of the Court that they seemed to have missed the dispositive issue when certiorari was granted to address anti-alienation considerations but not to address the effect of the underlying plan documents. *See, e.g.,* Oral Argument in *Kennedy* (Oct. 7. 2008), http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-636.pdf, at pp. 5 (''because my state of mind is I'm sorry we limited it'') (Justice Breyer), 23 (''Well, we . . . could have — you know, we should have thought of that when we limited . . . our grant of certiorari to . . . the one question on which you agree with the Petitioner. But we did do that, didn't we, even though the other one . . . was explicitly put under our nose . . . .'') (Justice Scalia), 32 (''I think there is a question of the way it was phrased. And perhaps the court just didn't get it, what that question on which we didn't grant cert was driving at.'') (Justice Ginsberg). On October 28, 2008, after the oral argument, the Court asked the parties whether §404(a)(1)(D) of ERISA, ''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.'' 555 U.S. 990 (2008). *See generally* Albert Feuer, *Did a Unanimous Supreme Court Misread ERISA and Its Own Precedents, Undermine Basic ERISA Principles, and Encourage Benefits Litigation?* 37 Tax Mgmt. Comp. Plan. J. 247, 252–54 (Oct. 2, 2009).

[17] 555 U.S. at 301. The Court did leave open the possibility that a plan administrator may give credence to a waiver offered by a beneficiary who refuses to take a distribution of plan benefits. The Court said, ''We do not mean that the whole law of spendthrift trusts and disclaimers turns up in [ERISA §206(d)(1)], but the general principle that a designated spendthrift can disclaim his trust interest magnifies the improbability that a statute written with an eye on the old law would effectively force a beneficiary to take an interest willy-nilly. Common sense and common law both say that '[t]he law certainly is not so absurd as to force a man to take an estate against his will.' '' *Id.* at 295–96 (quoting *Townson v. Tickell*, 3 Barn. & Ald. 31, 36, 106 Eng. Rep. 575, 576–77 (K.B. 1819)). However, the case in which a beneficiary, for estate-planning or other reasons, affirmatively asks a plan administrator not to distribute plan benefits to the beneficiary is not the situation under consideration in this Article. By hypothesis, the situation here will involve a named beneficiary who is actively asserting a right to payment, regardless of the provisions that might be contained in prior documents governing the marital dissolution. (It is also noted that the Court declined to consider whether the waiver at issue would be effective if it were ''consistent with plan provisions.'' *See id.* at 299 n. 10.)

[18] *M&G Polymers USA, LLC v. Tackett*, 190 L. Ed. 2d 809, 816 (2015) (quoting *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 612 (2013) (brackets in text above in *Tackett*; other internal quotations marks, brackets and citations omitted in *Tackett*)); *cf. Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 114 (2008) (noting that the finding of a conflict of interest in a plan administrator which both evaluates claims for benefits and pays such benefits ''will not seriously discourage the creation of benefit plans'').

[19] *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1548 (2013); *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 611 (2013); *see also Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 114 (2008); *cf. Boggs v. Boggs*, 520 U.S. 833, 854 (1997) (''The axis around which ERISA's protections revolve is the concepts of participant and beneficiary.'').

[20] Thus, the Fifth Circuit's decision was affirmed by the Court because the end result in the case (that the purported beneficiary other than the named beneficiary was not entitled to payment from the plan) remained unchanged.

[21] *See also* below n. 22 and accompanying text.

[22] *Kennedy*, 555 U.S. at 300 n.10.

[23] 474 Mich. 151, 156–59, 712 N.W.2d 708, 712–13 (2006).

ISSN 0747-8607

retaining those proceeds,'' and to *Pardee v. Pardee*,[24] which held that ERISA does not preempt enforcement of allocation of ERISA benefits in a state court divorce decree because ''the pension plan funds were no longer entitled to ERISA protection once the plan funds were distributed.'' The effect of this footnote from *Kennedy* can be seen in a number of post-*Kennedy* decisions by other courts, which are discussed below.[25]

The Reach of the Plan Documents Rule

Under ERISA, the Plan Documents Rule extends with equal force not only to heavily regulated ''pension plans'' but also to relatively less regulated life-insurance and other ''welfare plans.'' Attorneys accustomed to dealing with QDROs may be surprised to find that welfare plans not subject to the fully articulated QDRO rules are, like ''pension plans,'' also subject to the full force of the Plan Document Rule that was identified by *Kennedy* as being the controlling rule. This result arises not because the Plan Documents Rule is a part of some technically detailed regulatory regime applicable to specific types of plans, but rather emerges from the basic ERISA rule (under ERISA §404(a)(1)(D)), generally applicable to all ERISA plans (including welfare plans), that the plan documents govern to the extent consistent with ERISA.[26]

Thus, the Plan Documents Rule will generally apply to plans to which ERISA's detailed spousal, form-of-benefit and beneficiary-designation rules[27] do not apply, and to plans to which ERISA's anti-alienation rules[28] do not apply. As a result of *Kennedy* and the reasoning therein, it should not be assumed that, because detailed spousal beneficiary and alienation rules are inapplicable, there is any less of an issue. In fact, the stakes are in some ways even higher and more dangerous in the case of welfare plans, given that (1) practitioners may be even less likely to realize that the ERISA rules could render a beneficiary designation invalid under a relatively less regulated type of plan,[29] and (2) the amounts payable as benefits under welfare plans — notably life-insurance plans — could, depending on the facts, dwarf the amounts payable under retirement plans.

A Sampling of Post-*Kennedy* Jurisprudence

So what happens, in light of the Plan Documents Rule, if beneficiary designations on file with a plan are not conformed to the parties' intent and documentation governing the marital dissolution? A sampling of post-*Kennedy* jurisprudence may give an indication. In a number of cases, the courts have addressed situations in which a plan participant did not change the designation in an ERISA plan of the participant's former spouse, notwithstanding a divorce decree, separation agreement or other governing dissolution decree or document that purports (or could be read to purport) to include a waiver by the spouse of any possible interest under a plan. Indeed, when post-

[24] 2004 Ok. Civ. App. 27, ¶¶20, 27, 112 P.3d 308, 313–16 (2004).

[25] The Court's decision in *Kennedy* was unanimous, in an era in which unanimous decisions are not overly common, and thus, not only its primary holding but also its dicta and other discussion may be particularly influential. *But see* Albert Feuer, *The Kennedy Supreme Court Giveth with Footnote 13, but Taketh with Footnote 10 — the Department of Labor and Many Lower Courts Miss the Decision's Ultimate Meaning*, 39 Tax Mgmt. Comp. Plan J. 111 (June 3, 2011) (arguing that *Boggs v. Boggs*, 520 U.S. 833 (1997), which is cited in footnote 10 of the *Kennedy* decision and that held that ERISA does not permit the taking of distributed benefits, is more persuasive than *Sweebe* and *Pardee*).

[26] The reasoning of the Court would not be directly applicable to, for example: (1) so-called ''top hat'' plans (i.e., deferred-compensation plans for a select group of management or highly compensated employees), which are plans that are not subject to Part 4 of Subtitle B of Title I of ERISA (referred to below as ''Part 4''), *see* ERISA §401(a)(1) (although they are subject to Part 5 (as well as Part 1) thereof (including the preemption provisions of ERISA §514)), *but see* Albert Feuer, *The Effects of Marital Property Rights, Alimony, Child Support, and Domestic Relations Orders on Top-Hat Plans, Excess Benefit Plans, and Bonus Plans*, 38 Tax Mgmt Comp. Plan. J. 319 (Dec. 3, 2010) (arguing that, under *Boggs v. Boggs*, 520 U.S. 833 (1997), benefit entitlements under all ERISA plans, including top hat plans, are determined by the applicable plan terms); (2) plans and arrangements that are not subject to ERISA at all because they are neither ''pension plans'' nor ''welfare plans'' under ERISA (e.g., certain stock-option, restricted-stock and bonus plans); (3) certain individual retirement accounts described in 29 C.F.R. §2510.3-2(d) with no employer contributions; (4) certain I.R.C. ''§403(b)'' programs with no employer contributions that, under 29 C.F.R. §2510.3-2(f), are not considered ''established or maintained by an employer''; and (5) arrangements that do not otherwise rise to the level of being ''plans,'' *see, e.g., Ft. Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (relating to arrangements not requiring an administrative scheme). The legal analysis for such plans and arrangements is different than that applicable to ''pension plans'' and ''welfare plans'' covered by ERISA, because plans and arrangements not subject to Part 4 are not subject to Part 4's express Plan Documents Rule. Nevertheless, matrimonial attorneys may be well-advised to assure that in these cases, too, as well as in any other situation involving beneficiaries, beneficiary designations and domestic relations documents are consistent with each other and with the divorcing parties' intentions.

[27] *See* ERISA §205; I.R.C. §401(a)(11), §417.

[28] *See* ERISA §206(d); I.R.C. §401(a)(13), §414(p).

[29] The non-ERISA practitioner could be forgiven for failing to recognize this nuance, as it seems that many ERISA attorneys had believed that the QDRO rules governed the issue. *See also* above n. 16.

ISSN 0747-8607

Kennedy courts decide cases between competing purported beneficiaries, some observers may even be surprised that there are any open issues to be decided.[30] As shall be seen below, there may well be quite a few open issues left in *Kennedy*'s wake.

In *Flesner v. Flesner*,[31] the sole beneficiary under a life-insurance plan covered by ERISA divorced the plan participant pursuant to a divorce decree that divested her of all interests in her ex-husband's property, including benefits existing by reason of the late husband's past, present or future employment. The participant had not changed the applicable beneficiary designations in accordance with applicable plan terms before dying approximately seven months after the divorce. Thus, there was an issue with respect to whether she could retain the benefit that she had received under the terms of the plan. Similarly, in *Hennig v. Didyk*,[32] a participant in an ERISA-covered life-insurance plan divorced his then wife pursuant to a divorce decree that divested her of all her rights and interests to claims regarding the participant's property, including life insurance policies, but died approximately three years after the divorce without having changed the designation of the ex-wife as beneficiary.[33] In both cases, the court held that the life-insurance benefits may, as a matter of contract, be recovered or otherwise obtained by the participant's estate from the participant's former spouse who was a named beneficiary and whose divorce decree included a waiver of such benefits.

In *Andochick v. Byrd*,[34] a former husband filed a declaratory action against his ex-wife's estate for her ERISA-covered I.R.C. §401(k) plan (§401(k) plan) and life-insurance benefits. The divorce decree incorporated a separation agreement in which the former husband waived any survivor benefits under the §401(k) plan and future rights to the life insurance benefits. The participant had not changed the applicable beneficiary designations of her former spouse in accordance with applicable plan terms before dying approximately 28 months after the divorce, and approximately 58 months after the execution of the separation agreement. The court held that both the §401(k) and life insurance benefits may be recovered from the former husband. Similarly, in *Appleton v. Alcorn*,[35] a married couple entered into a settlement agreement, which was later incorporated into an order of separate maintenance, where each party waived any interest in the other party's ERISA-governed §401(k) plan and life insurance benefits. The participant had not changed the applicable beneficiary designations (which in the case of the §401(k) plan defaulted to the spouse) in accordance with applicable plan terms before dying approximately seven months after the entry of the order, and approximately nine months after the execution of the separation agreement. After the participant died, the participant's estate sued the participant's wife for the death and survivor benefit under, respectively, the participant's insurance and retirement plans, that were distributed to the former wife. The court held that the retirement and insurance benefits may be recovered from the beneficiary.

In the *Estate of Kensinger v. URL Pharma, Inc.*,[36] the appellate court relied on contract law to reverse a summary judgment that the former wife could retain §401(k) plan benefits distributed to her pursuant to the plan terms, and remanded the case.[37] The divorce decree incorporated a separation agreement in which the former wife waived any interest in benefits under the ERISA-governed §401(k) plan. One of the issues to be considered below was the former wife's argument that the participant, who had died approximately nine months after the finalization of the divorce, intention-

[30] *See, e.g.,* Susan L. Wynn, *What Happens After a 401(k) Plan Distributes Dead Participant's Benefits to Ex-Wife*, The Pension Protection Act Blog (Mar. 23, 2012), http://erisafile.com/blog/tag/kennedy-v-dupont/ (stating, in reference to the *Kensinger* case, discussed in text, ''Just when it looked like . . . *Kennedy* . . . settled disputes over a deceased participant's account balance where there has been no change of beneficiary designation post-divorce, the Third Circuit comes up with a new twist.'').

[31] 845 F. Supp. 2d 791 (S.D. Tex. 2012).

[32] 438 S.W.3d 177 (Tex. App. 2014).

[33] In *Hennig*, evidence was presented that the participant had thought he had made an online change of the designation from his former spouse to his parents (who were the same parties entitled to his estate assets). *Id.* at 179–81; *see also Becker v. Mays-Williams*, No. 13-35069, 2015 BL 20193 (9th Cir. Jan. 28, 2015) (presuming that the plan administrator may express no opinion on whether a participant's post-divorce beneficiary designation by telephone complied with the plan terms before the administrator interpleads the rival benefit claimants); below. n. 46 and accompanying text; *cf.* Albert Feuer, *Determining the Death Beneficiary Under an ERISA Plan and the Rights of Such a Beneficiary*, 54 Tax Mgmt. Memo. 323, 336–41 (Aug. 26, 2013) (arguing that ERISA plan fiduciaries have a fiduciary obligation to (1) describe clearly to plan participants how to make beneficiary designations, (2) decide whether those conditions are satisfied, without interpleading and (3) generally defend the rejection of any benefit claims that are based on a non-compliant designation).

[34] 709 F.3d 296 (4th Cir. 2013).

[35] 291 Ga. 107, 728 S.E.2d 549 (2012).

[36] 674 F.3d 131 (3d Cir. 2012).

[37] It is noted that the courts in *Flesner*, *Hennig*, *Andochick*, *Appleton* and *Kensinger*, all relied on state law to grant the participant's estate the survivor benefits under the applicable plans, seemingly without regard to whether the estate would be the beneficiary under the plan terms if the participant's former spouse had refused to take payment of the plan benefit. *But see Kennedy*, 555 U.S. at 293 (appearing to presume that the claim of the participant's estate rested on the estate being such a default beneficiary).

ISSN 0747-8607

ally chose to have the benefits go to his ex-wife after the divorce.[38]

In *Langevin v. McMorrow*,[39] the participant and his former spouse had entered into a marital agreement in which the spouse waived (among other things) her rights under the participant's ERISA-governed pension plan. The agreement was incorporated into a divorce decree. The participant had not changed the applicable beneficiary designation of his former wife in accordance with applicable plan terms before dying approximately 19 years after the issue of the decree. Upon the participant's death, the plan administrator of the ERISA-governed §401(k) plan distributed the benefits to the spouse, the named beneficiary of the plan, and the participant's estate filed a complaint against the former wife in probate court. Similarly, in *Staelens v. Staelens*,[40] the participant and his spouse had entered into a separation agreement whereby the spouse waived her rights to claim benefits under the participant's ERISA-governed §401(k) plan and insurance policy. The agreement was incorporated into a divorce decree. The participant had not changed the applicable beneficiary designation of his former wife in accordance with applicable plan terms before dying approximately 42 months after the issue of the divorce decree and 45 months after executing the separation agreement. The participant's estate brought suit against the former wife, arguing that she waived her rights under the separation agreement.[41] In both *Langevin* and *Staelens*, the court held that the §401(k) benefits may not be recovered from a beneficiary whose divorce decree included a waiver of such benefits.

In re Succession of Meyerer[42] is another case in which the court declined to allow recovery against the named beneficiary. William, the plan participant, and Teresa had been married in 1974. A marital separation agreement contained a provision by Teresa ''to convey and transfer any and all ownership interest'' in William's pension plans. This agreement was for the execution of the documents needed to consent to the participant's waiver of the participant's spousal survivor benefit from two particular plans. William's daughters from an earlier marriage sought to recover the survivor benefits from Teresa as the legatees of William's will after William's death in 2009. The court, in rejecting those claims, relied on a finding that only the participant was entitled to enforce the obligation. No evidence was presented of any attempts by William to do so.[43] It is worthy of note that, even though the divestiture provision of the agreement in *Succession of Meyerer* did have an obvious apparent value to a participant, the court did not permit recovery of the surviving spouse's benefits by the other claimants.

In all of these cases, the official beneficiary designations had not been revised during or after the process resulting in the marital dissolution or order of support. The controversy became one focused upon the competing claims of those alleging to have the prevailing beneficial interest. The cases show, at a minimum, that (1) the applicable analysis is subject to dispute and the ultimate results will be uncertain and (2) even if a claimant prevails, the path to recovery can be time-consuming, expensive and even tortuous.[44] While in some cases the participant's intended beneficiary may succeed in court, why should that beneficiary have to incur the legal expenses involved in pursuing a claim, to deal with the vagaries of the factual permutations that may be presented and to navigate through the various analytical legal uncertainties that may arise?

These cases are significant regardless of whether the ''right'' beneficiary ultimately prevailed. In every case, unnecessary uncertainty was injected into the situation, and the parties were put in the position of having to retain attorneys and pursue potentially costly and time-consuming litigation to resolve disputes that simply would not have arisen, had the beneficiary designations been revised to be consistent with the parties' intent and the applicable domestic-relations documents.

ACTION POINTS

In General

The Plan Documents Rule is stark in its simplicity. Essentially, in the case of the death of a plan participant, the plan administrator is to read the plan, see what beneficiaries are named in accordance with the plan documents and pay out the benefits accord-

[38] The appellate court did not consider the spouse's argument because the argument had not been presented to or mentioned by the court below. *Id.* at 139.

[39] 2011 Mass. App., No. 10-P-1591 (Mass. App. Ct. June 20, 2011), *aff'd*, 948 N.E.2d 919 (Mass. App. Ct. 2011).

[40] 677 F. Supp. 2d 499 (D. Mass. 2010).

[41] Note that, in *Staelens*, there was testimony about the opportunities the participant (who had died four years after the issuance of the divorce decree) had to change the designation, the former spouse's friendly post-divorce relations with the participant and the participant's statement that he intended to keep the former spouse as his beneficiary after the divorce. *Id.* at 502–03.

[42] 146 So. 3d 574 (La. Ct. App. 2014).

[43] *Id.* at 575–79.

[44] In addition, there is no guarantee that a successful claimant will necessarily be able to recover any judgment that is obtained.

ISSN 0747-8607

ingly.[45] Where the named beneficiaries are not the intended recipients of the benefits, the various competing parties may be left to fight among themselves. On the other hand, while the starkness and inflexibility of the Plan Documents Rule has the potential to make mischief where beneficiary designations are left to languish, its straightforwardness also presents a significant opportunity for the parties and their attorneys to achieve definitive clarity by taking simple steps. This opportunity may well be wasted, however, unless the attorneys are aware of the need for these simple steps, and then take them.

If a participant wishes to change a beneficiary in connection with a marital settlement, the designation should generally be carefully and expressly changed to the preferred party, with a specific beneficiary change made in accordance with the plan — the parties should not merely rely on the general non-plan documents governing the dissolution. Such care will avoid confusion between the parties at the time of the dissolution and any needless litigation about who is entitled to receive death benefits from an ERISA plan, and whether the benefits may be wrested from the person entitled to such benefit payment. It is noted in this regard that it can be critical that any beneficiary changes (or redesignations) be made in accordance with the applicable rules under the governing plan.[46]

Step one, the attorneys should be sure to ascertain the intent of the parties regarding plan benefits. This step may seem both obvious and simple, but sometimes there is a lack of focus on the ultimate disposition of plan benefits and the interaction between those benefits and the other assets being allocated between the parties. Thus, has there been adequate focus on the consequences of moving life insurance and retirement benefits to or from a separating or divorcing spouse and the estate, a child or another party? And have all of the settlement documents, considering all of the property being divided and allocated, carefully taken into account the manner in which plan benefits are to be treated?[47] Care should be taken to attend to such matters and accurately ascertain the true intent of the parties, before moving on with taking action with respect to the underlying beneficiary designations and the conforming of those designations to that intent.[48]

Step two, which may well simultaneously be the most critical and most simple step, follows next. The attorney, having ascertained the client's intent and drafted the marital dissolution or other applicable non-plan documentation accordingly, now needs to ensure that the beneficiary designations on file with the plan (including those with any insurance compa-

---

[45] As broad and simple as the Plan Documents Rule is, there are few rules that are subject to no exceptions whatsoever. Examples of situations in which the Plan Documents Rule might not be absolute could include (1) situations involving generally applicable state criminal laws, *cf.* ERISA §514(b)(4), and (2) situations implicating so-called ''slayer'' statutes, *see generally* Albert Feuer, *When Do State Laws Determine ERISA Plan Benefit Rights?* 47 J. Marshall L. Rev. 145, 303–313, 393–95 (2013), http://ssrn.com/abstract=2440008; Katherine A. McAllister, *A Distinction Without a Difference? ERISA Preemption and the Untenable Differential Treatment of Revocation-on-Divorce and Slayer Statutes*, 52 B.C. L. Rev. 1481 (2011), http://lawdigitalcommons.bc.edu/bclr/vol52/iss4/6/.

[46] It also may be worthwhile to take the additional step of checking that the beneficiary designation was in fact actually changed on the plan's books and records. Such a reconfirmation might be particularly worthwhile in the case of a change in designation that is made through electronic or telephonic means rather than by submitting the written form to the plan administrator. *See, e.g., Becker v. Mays-Williams*, No. 13-35069, 2015 BL 20193 (9th Cir. Jan. 28, 2015) (addressing a situation in which, after a divorce, a participant (who later died), on a telephone call, designated his son rather than his previously designated spouse as beneficiary, but never signed and returned a conforming written beneficiary-designation form) (also containing extensive citation to relevant cases dealing with what constitutes plan documents); *see also* above n. 33.

[47] If a participant does not wish to change the spousal beneficiary in connection with a marital settlement, the former spouse should not be accidentally divested of the benefit in the settlement documents. Attorneys may want to watch for boilerplate language that may contain unintentionally broad waiver and other provisions that may not accurately reflect the intent of the parties, which can lead to unintended disputes and other complexities if those provisions conflict with the applicable express designations or otherwise conflict with the parties' intentions.

[48] Note also that similar issues can arise in friendly contexts such as estate planning, as well as in adversarial contexts involving marital dissolutions. For example, a network of wills and trusts might purport to allocate assets to a party that differs from the beneficiary on the official beneficiary-designation form. The estate-planning lawyer should make sure that the testamentary documentation is consistent with the submitted plan forms, and have the submitted forms conformed as appropriate.

Another *Kennedy*-related wrinkle that can arise even in the absence of a marital conflict is shown by the case of *Sanders v. Chrysler Grp., LLC*, No. 13-CV-11046, 2015 BL 17435 (E.D. Mich. Jan. 26, 2015). In *Sanders*, a participant of an employer-sponsored plan designated his then-spouse for surviving-spouse benefits. After the spouse's death, the participant notified the plan of her death but failed to designate a new beneficiary for the surviving-spouse benefits (resulting in higher payments to the participant while he was alive, under a single-life annuity). The participant then remarried and then died while still married approximately a year later. The plan rejected her survivor-benefit claims on the ground that the participant never re-elected her as the new beneficiary. The court held that the terms of the plan spell out precisely what a retiree must do to elect coverage and designate a new beneficiary, stating that the Plan Documents Rule permits ERISA administrators to adhere to the letter of the plan documents, even in the face of contradictory evidence. *Sanders* is a cautionary tale that shows how the failure to attend to enrollment procedures and beneficiary designations can needlessly cost loved ones the benefits that participants intend for them, particularly in the post-*Kennedy* world. *See also* above n. 6 (relating to the loss of insurance benefits based on a misinterpretation of plan terms).

ISSN 0747-8607

nies) are conformed[49] to the documentation that governs the resolution of the domestic dispute.[50] The simplicity of taking this step belies its potential importance — if the basic act of designating a beneficiary is not taken,[51] the costs of dealing with the fallout, and maybe even the possibility that benefits will not ultimately be paid as intended, may well materialize.[52]

Failing to take these straightforward steps may frustrate the intent of the parties and skew and pervert the economic settlements that the parties thought they had reached. While the solution may be simple and not appear to be an ineffable revelation, the fact remains that, if the solution is not undertaken, much grief may ensue.

In light of the foregoing, domestic-relations lawyers would be well-advised to assume that the beneficiary designation on the plan's (including any insurance company's) books and records are dispositive. Simply put, echoing the simplicity of the rule, there simply is no reason not to attend to the applicable designations and conform the designations to the parties' intent and the resulting documentation that governs the marital dissolution. Essentially, we are where we are, and taking these simple steps will go a long way to protecting the interests of plan participants whose marriages are dissolving.

Certain Special Cases

In some cases, the failure to review the plan documents may lead to particularly surprising unfortunate results. Two such situations are considered below.

Certain Automatic Revocations of Beneficiary Designations. A particularly insidious problem can arise where a plan provides for an automatic revocation of the beneficiary designation of a participant's former spouse in the event of a divorce.[53] Thus, the beneficiary designation can change without the participant's awareness, possibly in a way that is inconsistent with the participant's intent.[54] Domestic-relations attorneys should determine whether the plan in question contains automatic revocation-of-designation provisions and, if so, ensure that the resulting designations are consistent with or conform to, or are changed to be conformed to, the parties' intent.

Loss of Death Benefits. Some defined-benefit retirement plans may provide for death benefits — indeed, sometimes subsidized death benefits — only for a spouse, including, as applicable, an individual treated as a spouse pursuant to a QDRO. Thus, removing a spousal beneficiary under such a plan may cause benefits that might otherwise have been paid not to be paid at all. In effect, benefits could be left on the table, particularly where survivor benefits are only payable to a spouse. Similar issues may arise for unmarried

---

[49] Where necessary, the change in beneficiary should be undertaken in compliance with any applicable spousal-consent rules or pursuant to a QDRO. It is noted that, where the QDRO rules apply, the ERISA spousal beneficiary rights are terminated by a divorce or a legal separation agreement (one approved by a domestic-relations court), but not by those separation agreements that are not approved by a court. The ERISA spousal-survivor benefit provisions limit how spousal survivor benefits for ''pension plans'' may be changed. *See* ERISA §205(c); *see also* above n. 27.

Similarly, ''qualified medical child support orders'' (QMCSOs) need to be conformed to the parties' intentions. However, the issues that arise with respect to death and survivor benefits rarely arise with respect to QMCSOs, because any discrepancies between documents and the parties' intentions will become immediately apparent if the child is not obtaining the agreed benefits.

[50] In the case of attempted changes to beneficiary designations after the annuity starting date applicable to the benefits, many plans do not allow the applicable beneficiary designation to be changed. Further, those that do allow changes may have specific required procedures. *Cf. Sanders v. Chrysler Grp., LLC*, No. 13-CV-11046, 2015 BL 17435 (E.D. Mich. Jan. 26, 2015) (discussed at above n. 48). A careful inquiry into the plan's rules will inform the lawyer as to practical problems that may arise in such a case, and give the attorney a better chance to make a sensible determination regarding how best to proceed. If it becomes evident that the plan benefits are not allocated away from the named beneficiary, it may become appropriate to consider whether other property that is the subject of the applicable decree or agreement should be allocated in substitution for benefits that are the subject of an unchangeable beneficiary designation.

[51] Indeed, even in those cases in which the beneficiary designation is reviewed and determined to be correct given the terms of the marital dissolution (e.g., if the beneficiary is designated to be the soon-to-be-former spouse and that designation is intended to continue), the participant may wish to go the extra step of redesignating the intended beneficiary (''and I mean it,'' if you will) after the dissolution, so as hopefully to dispose conclusively of any argument by a later non-spouse beneficiary suing the former spouse with a claim that the designation was left unchanged in error or that the former spouse breached an obligation set forth in the domestic-relations document. Redoing the designation after the divorce is finalized leaves little question about the participant's intended beneficiaries, even if the participant does not desire a change to the beneficiary at such time. *See also* above n. 46.

[52] The request — nay, demand — of the Oscar Rogers character on NBC's Saturday Night Live (as played by Keenan Thompson) just to ''FIX IT!'' arguably resonates here. *See, e.g.,* Saturday Night Live: Weekend Update Thurs. (NBC television broadcast Oct. 23, 2008), http://www.nbc.com/Saturday_Night_Live/video/clips/update-freds-mapfix-it/784121/ (transcript available at http://snltranscripts.jt.org/08/08wu3update.phtml).

[53] *See generally* Albert Feuer, *Did a Unanimous Supreme Court Misread ERISA and Its Own Precedents, Undermine Basic ERISA Principles, and Encourage Benefits Litigation?* 37 Tax Mgmt. Comp. Plan. J. 247 (Oct. 2, 2009).

[54] Practitioners should be aware that state laws providing for automatic redesignation are preempted in the case of an ERISA plan. *See Egelhoff v. Egelhoff*, 532 U.S. 141 (2001). Thus, attorneys should never assume that a beneficiary designation under an ERISA plan will be changed automatically by virtue of a provision under state law.

ISSN 0747-8607

participants in the case of those defined-benefit plans that pay preretirement survivor annuities, or other survivor benefits, only where the participant has designated a beneficiary. Appropriate inquiries at the time of settlement/judgment should reduce the potential for surprises down the road.

CONCLUSION

The reliance by *Kennedy* on the Plan Documents Rule has given rise to a key trap for the unwary. If the beneficiary designation under an ERISA-governed plan is inconsistent with other domestic-relations documents, or otherwise inconsistent with the parties' intent, the beneficiary designation will nevertheless govern vis-à-vis the plan. Litigation and other disputes involving competing claimants may then ensue regarding whether, as between the competing claimants, the designated beneficiary is entitled to retain the amounts distributed to the beneficiary by the plan. Plans affected include not only highly regulated retirement plans, but also less regulated plans, such as life-insurance plans.

Fortunately, the Plan Documents Rule also provides a clear path to accuracy and certainty for those who are tuned in to the applicable rules. The system can work, and indeed, if the Plan Documents Rule is understood and addressed, can work quite well, both for the plan participant and for the other parties affected by the marital dissolution. Domestic-relations attorneys simply need (1) to consult with their clients, (2) to ascertain the intent of the clients and draft the applicable dissolution documentation so as to reflect that intent, and (3) critically, to consult with their clients so that the plan participant ultimately submits post-dissolution beneficiary designations that conform to the intended terms of the dissolution.

ISSN 0747-8607