

When is a Waiver Not a Waiver?

Here's a fairly typical situation in modern American life: a couple, married for many years, divorce. They have two substantial assets: a house and a pension, usually a 401(k) or other cash balance type plan. In the court proceedings, they decide that the most expedient way of dividing their accumulated wealth is to give one of the large assets (the marital residence) to one spouse in exchange for leaving the other (the pension) in the hands of the other. This scenario is exactly what played out in Kennedy v. Plan Administrator for DuPont Savings and Investment Plan, (U.S. Supreme Court 07-636) before the United States Supreme Court on October 7, 2008. The reason the Supreme Court is involved is because Mr. Kennedy, whose former wife explicitly agreed to relinquish her rights to his pension, neglected to tend to either of two ministerial acts. First, he (and his attorney) did not convert the property settlement agreement to a Qualified Domestic Relations Order (a "QDRO"). Second, he did not contact his pension Plan Administrator to change the beneficiary designation on his pension.¹ Thus, when Kennedy died, the Plan Administrator was compelled to distribute the pension benefits to the former Mrs. Kennedy - a result that deprived Kennedy's estate of the assets of his pension and instead transferred them to the only person in the world Kennedy did not want to have them: his ex-wife.

The legal reason for this peculiar result stems from two provisions of the federal law governing pensions, the Employee Retirement Income Security Act ("ERISA"). The first is something called the "anti-alienation" provision. This law mandates that pension plans must distribute pension plan assets to participants and designated beneficiaries (which include spouses of plan participants) unless an approved QDRO is submitted to the plan, permitting the spouse to

¹ Had Kennedy attempted to do this, the Plan would likely have instructed him to get a QDRO.

transfer (or alienate) her rights to the pension to her former husband. The second law requires pension plans to operate in accordance with their plan documents – and only the plan documents - in determining the appropriate recipients of plan benefits.

Mr. Kennedy's estate argued that the unapproved Settlement Agreement should be more than sufficient evidence to permit the plan to distribute the pension assets to his estate rather than to his former wife. The Supreme Court has not yet ruled on the estate's request, but one thing is very clear: Mr. Kennedy could have avoided the entire problem if he had only paid more attention to his most important asset.

The moral of the story is clear: know your pension rights. Don't let Plan Administrators, lawyers, judges or anyone else decide what to do with your money. Make sure that the decisions you make about the assets it takes a lifetime to accumulate are clearly spelled out and will in fact be implemented.