

## WHEN IS A WAIVER NOT A WAIVER (PART II)

In a previous legal update, the case of William Kennedy and his former wife, Liv, was still pending before the United States Supreme Court. That case has now been decided, and the answer turned on the least complex of the arguments presented by the litigants. To recap, there were four participants in the battle over the assets (roughly \$400,000.00) in Mr. Kennedy's Savings and Investment Plan ("SIP"): Mr. Kennedy himself, his former wife Liv, his daughter Kari (the executrix of his Estate) and the Plan Administrator for the DuPont SIP. When William and Liv divorced, the state court divorce decree, signed by both parties, contained a provision in which Liv waived all of her interest in William's SIP. The divorce decree was never converted to a Qualified Domestic Relations Order ("QDRO") under 29 U.S.C. §1056. Nor did William change his beneficiary designation with the Plan Administrator. These fundamental omissions are what led to the protracted court proceedings that are the subject of this article.

When William died, his daughter Kari was named the executrix of his Estate and she requested that the Plan Administrator pay the SIP funds to the Estate. The Plan Administrator, relying on the beneficiary designation, paid the benefits to Liv instead. The Estate sued the Plan

administrator, claiming that the waiver contained in the divorce decree precluded payment to Liv.

The Plan, in defending its actions, advanced two major arguments. First, argued the Plan, the waiver, absent a QDRO, is ineffective. Second, said the Plan, it is required to rely on the Plan documents when making benefit determinations and, as William did not remove Liv from the Plan's records, the Plan was compelled to distribute the money to his named beneficiary, Liv. The United States Supreme Court rejected the Plan's first argument, but accepted the second: Liv keeps the money.

The Court's rationale for rejecting the waiver argument is grounded in the interplay between two fundamental ERISA principles. The first is the combination of the anti-alienation and QDRO provisions. The anti-alienation provision prevents participants from assigning their pension benefits. The Court said that a waiver is not an assignment. In divorce proceedings, the QDRO anticipates payments to an alternate payee, usually the non-participant spouse. But a waiver does not create an alternate payee: it does just the opposite. As such, neither of these ERISA provision applies to the effectiveness of the waiver. The second principle on which the Court relied is the common law of trusts, which says that a beneficiary of a spendthrift trust is not required to accept or

retain an interest in such a trust, as long as s/he is not purporting to direct where the interest ultimately lands. Each principle points to the conclusion, said the Court, that the waiver could be effective under certain circumstances - or at least that these principles do not prevent one from renouncing or relinquishing rights to benefits.

In accepting the Plan's second argument, i.e., the beneficiary designation, the Court noted that every ERISA plan is required to operate pursuant to its governing documents (the "Plan Document Rule"). 29 U.S.C. §§1102 and 1104. The DuPont SIP Plan provided for a change in beneficiary designation, a process which William did not opt to engage. (The Court noted that William did change the designation on another DuPont Plan.) This failure to change the SIP designation, said the Court, required the Plan to follow its documents and distribute the benefits to his former spouse Liv.

The point is that by giving a plan participant a clear set of instructions for making his own instructions clear, ERISA forecloses any justification for enquiries into nice expressions of intent, in favor of virtues of adhering to an uncomplicated rule: "simple administration, avoid[ing] double liability and ensur[ing] that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules."

*Kennedy v. Administrator for DuPont SIP*, 555 U.S. at \_\_\_\_

(2009).

The Court noted that William could also have obtained a QDRO and that under those circumstances, the Plan would be justified in honoring the waiver - consistent with its duties to observing the Plan documents. The Court explained that the method of obtaining a QDRO is straightforward and that obtaining one requires supplying a relatively discreet list of objective criteria. Honoring the participant's beneficiary designation or requiring a QDRO, said the Court, advances the law's goal of simplicity in plan administration. The Court stated that under its decision "the plan administrator will pay benefits to a participant's designated beneficiary, with designations and changes to be made in a particular way. William's designation of Liv as his beneficiary was made in the way required; Liv's waiver was not." *Id.*

This ruling permits participants the maximum flexibility in determining the fate of their employee benefits. It recognizes that spouses may, in fact, waive their rights to pension benefits. However, in order for the waiver to be effective, the plan participant must clearly and unequivocally state his/her wishes either by a QDRO, where required by law, or on forms provided by the Plan.