Kennedy v. DuPont Savings: The Supreme Court Kills Two Conflicts With One Decision

Telephone Seminar/Audio Webcast
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SUMMARY OF KENNEDY V. PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN (January 26, 2009)
By Marshal Willick

The U.S. Supreme Court has made the lives of plan administrators easier, made the lives of divorce lawyers harder, and resolved a couple of questions while leaving others enormously unsettled and uncertain.

The unanimous Court held that an ex-wife's waiver of any rights under her husband's savings and investment plan (SIP) in a divorce decree that was not a QDRO did not control over her ex-husband's designation of her as his beneficiary in accordance with the terms and forms of the SIP, at least as to how the plan should make out checks, if not as to who should ultimately get the money.

The Courts of Appeals and State Supreme Courts have been split for some years as to whether to recognize waivers by spouses of pension plan benefits in divorce decrees, where (as is usually the case) the decrees do not qualify as QDROs. Not unexpectedly, the Court permitted the convenience of plan administrators to trump any need to do equity, and held that when a plan has rules, procedures, and forms through which a participant may alter a beneficiary designation, the plan documents control over any attempted waiver of any interest in the pension plan by an ex-spouse in a divorce decree.

William Kennedy, participated in his employer's defined contribution savings and investment plan (SIP). In 1971, William married Liv, and in 1974 he signed a form designating her as the survivor beneficiary under the plan, without naming a contingent beneficiary to take benefits if she disclaimed her interest. The plan in question permitted a participant to both designate a survivor beneficiary, and to replace or revoke that designation. The plan required "all authorizations, designations and requests concerning the Plan to be made by employees in the manner prescribed by the plan administrator," and provided the requisite forms. The plan also provided that if there was no surviving spouse or designated beneficiary upon death, the benefits would be directed by the estate's executor or administrator.

William and Liv divorced in 1994. Their divorce decree divested Liv of her interest in the SIP. For reasons never explained, however, William did not execute the form removing Liv as the SIP beneficiary. He did change the beneficiary designation for his pension plan, naming his daughter as beneficiary, but he never altered the beneficiary under the SIP.

William died in 2001. The plan administrator relied on William's designation form and paid the benefits to Liv. The Estate sued, alleging that Liv had waived her pension plan benefits in the divorce and that the plan had thus violated ERISA by distributing the benefits to her.

The District Court entered summary judgment for the Estate, ordering the plan to pay the benefits to the Estate. However, the Fifth Circuit reversed, holding that Liv's

divorce-decree waiver was an “assignment or alienation” of her interest to the Estate, which was barred by ERISA. The Estate appealed.

The Supreme Court found that the divorce decree waiver was not a prohibited “assignment or alienation,” but ultimately affirmed the Fifth Circuit decision anyway.

Specifically, the Court found that the divorce decree waiver did not violate ERISA’s anti-alienation or anti-assignment clauses. It also rejected the oft-recited “distinction” between “welfare plans” and “pension plans,” and held that a simple waiver by a spouse of survivor benefits does not satisfy the definition of either an “assignment” or a “transfer,” and thus is not barred by the antialienation provision of ERISA, or otherwise. The Court reasoned that, therefore, a waiver could be effective even though it does not satisfy the requirements to be a QDRO.

In this case, however, the Court found that the plan documents explicitly provided that the plan would pay benefits to a participant’s designated beneficiary, and included straight-forward forms and procedures for any changes in the designation of the named beneficiary. William’s designation of Liv as his beneficiary was made in the way required; Liv’s waiver was not. The Court decided that in those circumstances, plan administrators should not be forced “to examine a multitude of external documents that might purport to affect the dispensation of benefits,” and be drawn into litigation over the meaning and enforceability of purported waivers.

The Court focused on “administrative ease,” and held that where a plan participant has a clear set of instructions for manifesting his intent to name or change a beneficiary, ERISA does not allow the plan to go beyond those instructions, to foster “simple administration, avoiding double liability, and ensuring that beneficiaries get what’s coming quickly, without the folderol essential under less-certain rules.”

Accordingly, the Court held that the plan could and should ignore Liv’s divorce-decree waiver of the survivorship benefits, and “did its statutory ERISA duty by paying the benefits to Liv in conformity with the plan documents.” The Court noted that a plan administrator is obliged to act “in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of ERISA, and the Act provides no exemption from this duty when it comes time to pay benefits.”

But the Court left unresolved significant questions, noting that its decision “leaves open any questions about a waiver’s effect in circumstances in which it is consistent with plan documents.” Here, the waiver was not contemplated by the terms of the SIP and had no effect. But if the plan terms had allowed for a written waiver outside of the plan’s specified forms and beneficiary change procedures, the waiver would apparently have been honored, although the scope and effect of such a permitted waiver was unspecified.

The Court explicitly refused to 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, noting that various courts have distinguished the Court's prior holding in Boggs v. Boggs, 520 U.S. 833, 853 (1997), but not otherwise commenting on those cases.

The Court also "expressed no view regarding the ability of a participant or beneficiary to bring a cause of action under ERISA where the terms of the plan fail to conform to the requirements of ERISA and the party seeks to recover under the terms of the statute." So if the plan terms had not conformed to ERISA in any respect, suit against the plan by an intended beneficiary apparently would have been permitted.

The ultimate result was the declaration that even though the ex-wife's divorce decree waiver of her interest in her ex-husband's plan was "not rendered a nullity," the plan was still entitled to distribute to her the benefits designated on the beneficiary form, because the ex-husband took no steps to remove her as beneficiary or name a new beneficiary, as he was allowed and required to do under the terms of the SIP. Apparently, if the SIP had said that in the event of a divorce the designation of an ex-spouse was automatically nullified and the beneficiary was to be the participant's estate until a different beneficiary was named, that would have been the result.

SAMPLE POST-KENNEDY BENEFICIARY PROVISIONS
By Wayne Jacobsen, O'Melveny & Myers, LLP March 2009

Note: These sample provisions were derived from a defined contribution plan that is exempt from the qualified joint and survivor annuity ("QJSA") requirements pursuant to Code Section 411(a)(11)(B)(iii).

"Beneficiary" or "Beneficiaries" shall mean the person or persons, including a trustee, personal representative or other fiduciary, last designated in writing by a Participant in accordance with the provisions of Section to receive the benefits specified hereunder in the event of the

Participant's death. If there is no validly designated Beneficiary or surviving validly designated Beneficiary, then the Participant's spouse shall be the Beneficiary. If there is no surviving spouse to receive any benefits payable in accordance with the preceding sentence, the duly appointed and currently acting personal representative of the Participant's estate (which shall include either the Participant's probate estate or living trust) shall be the Beneficiary. If there is no personal representative of the Participant's estate duly appointed and acting in that capacity within 90 days after the Participant's death (or such extended period as the Committee determines is reasonably necessary to allow such personal representative to be appointed, but not to exceed 180 days after the Participant's death), then Beneficiary or Beneficiaries shall mean the person or persons who can verify by affidavit or court order to the satisfaction of the Committee that they

are legally entitled to receive the benefits specified hereunder.

In the event any amount is payable under the Plan to a minor, payment shall not be made to the minor, but instead shall be paid to (i) that person's then living natural or adoptive parent(s) to act as custodian, (ii) if that person's natural or adoptive parents are divorced, and one such parent is the sole custodial parent, to such custodial natural or adoptive parent, or, (iii) if no natural or adoptive parent of that person is then living, to a custodian selected by the Committee to hold the funds for the minor under the Uniform Transfers or Gifts to Minors Act in effect in the jurisdiction in which the minor resides. If no natural or adoptive parent is living and the Committee decides not to select another custodian to hold the funds for the minor, then payment shall be made to the duly appointed and currently acting guardian of the estate for the minor or, if no guardian of the estate for the minor is duly appointed and currently acting within 60 days after the date the amount becomes payable, payment shall be deposited with the court having jurisdiction over the estate of the minor.

In the event any amount is payable under the Plan to a person for whom a conservator has been legally appointed, the payment shall be distributed to the duly appointed and currently acting conservator, without any duty on the part of the Committee to supervise or inquire into the application of any funds so paid.

Designation of Beneficiary.

(a) Each Employee who becomes a Participant shall designate the Beneficiary or Beneficiaries whom such Employee desires to receive the benefits of the Plan in the event of such Employee's death. Such designation shall be made in a manner or method as determined by the Committee, which may include electronic methods to the extent permitted by law. Any purported attempt to designate a Beneficiary in a manner other than as determined by the Committee shall be void and shall have no effect, and the Beneficiary shall be determined as if such attempt had not been made. Without limiting the generality of the foregoing, [except as expressly provided in subsection (e),] a Beneficiary may not be designated through a court order. [Note: bracketed material to be deleted if subsection (e) is not used.]

(b) A Participant may from time to time change his designated Beneficiary or Beneficiaries without the consent of such Beneficiary or Beneficiaries by making a new designation. However, if a married Participant wishes to designate a person other than his spouse as Beneficiary, such designation shall be consented to in writing by the spouse, which consent shall acknowledge the effect of the designation and be witnessed by a notary public.

The Participant may change any election designating a Beneficiary or Beneficiaries without any requirement of further spousal consent if the spouse's consent so provides. Notwithstanding the foregoing, spousal consent shall be unnecessary if it is established (to the satisfaction of a Plan representative) that there is no spouse or that the required

consent cannot be obtained because the spouse cannot be located, or because of other circumstances prescribed by Treasury Regulations.

(d) The Company, the Committee and the Trustee may rely upon a Participant's last designation of Beneficiary or Beneficiaries made in accordance with the terms of the Plan. Notwithstanding the foregoing, an unmarried Participant's Beneficiary designation shall become ineffective upon the Participant's subsequent lawful marriage and the Participant's spouse shall be deemed to be the Participant's Beneficiary, unless such deemed designation is changed with the consent of the Participant's spouse as provided for in this Section .

[(e) Upon the receipt of written proof of the dissolution of marriage of a Participant, any earlier designation of the Participant's former spouse as a Beneficiary shall be treated as though the Participant's former spouse had predeceased the Participant, unless, prior to payment of benefits on behalf of the Participant (1) the Participant executes and delivers another

Beneficiary designation that complies with this Section and that clearly names such former

spouse as a Beneficiary, or (2) there is delivered to the Plan a domestic relations order providing that the former spouse is to be treated as the Beneficiary. In any case in which the Participant's former spouse is treated under the Participant's Beneficiary designation as having predeceased the Participant, no heirs or other beneficiaries of the former spouse shall receive benefits from the Plan as a Beneficiary of the Participant except as provided otherwise in the Participant's Beneficiary designation.] [Note: some employers prefer to honor the beneficiary designation on file even if there has been a subsequent divorce. In such an instance, subsection (e) would be omitted.]

Websites Related To
KENNEDY V. PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN, ET AL. (No. 07-636, January 26, 2009)

- Supreme Court Decision: www.supremecourtus.gov/opinions/08pdf/07-636.pdf

- Docket: www.supremecourtus.gov/docket/07-636.htm

- Oral Argument Transcript:
www.supremecourtus.gov/oral arguments/argument transcripts/07-636.pdf

- SCOTUSWIKI (here you can find links to briefs and other documents, as well as arguments, argument recaps, and opinion analysis):
www.scotuswiki.com/index.php?title=Kennedy v. Plan Adm. for Dupont Savings

- U.S. Department of Labor, Kennedy v. DuPont Amicus Brief: www.dol.gov/sol/media/briefs/Kennedy(A)-05-2008.htm

- Supplemental Brief for the United States as Amicus Curiae Supporting Respondents: www.usdoi.gov/osg/briefs/2008/3mer/1ami/2007-0636.supp.mer.ami.pdf

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- Workplace Prof Blog, "Detailed Guidance on Kennedy v. DuPont": http://lawprofessors.typepad.com/laborprof blog/2009/02/detailed-guidan.html

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- More Law Lexapedia:

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- U.S. Department of Labor, "Qualified Domestic Relations Orders": www.dol.gov/ebsa/faqs/faq qdro.html