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Attorneys Discuss Effect *Kennedy* Decision Might Have on Drafting of Plan Documents

In response to the U.S. Supreme Court's recent adoption of the ''plan documents'' rule, plan administrators and sponsors should draft explicit plan language addressing whether they will honor extrinsic waivers of benefits contained in divorce decrees, an attorney discussing the implications of the case said March 4 in an audioconference sponsored by the American Law Institute-American Bar Association.

The Supreme Court on Jan. 26 adopted the ''plan documents'' rule in the context of beneficiary designation disputes. The rule requires plan administrators to act in accordance with the documents and instruments governing the plan. Prior to the high court's adoption of the rule, federal circuit courts were split on whether the rule should be used to resolve disputed claims to benefits under the Employee Retirement Income Security Act (*Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, 45 EBC 2249 (2009) (15 PBD, 1/27/09; 36 BPR 242, 2/3/09)).

In *Kennedy*, the Supreme Court unanimously ruled that the administrator of a retirement plan sponsored by E.I. DuPont de Nemours & Co. acted properly when it paid benefits to a plan participant's ex-wife who waived her right to such benefits in a divorce agreement that was not a qualified domestic relations order, but was still the named beneficiary at the time of the participant's death.

Convenience Trumps Equity. The moderator of the audioconference, Linda E. Rosenzweig of Keightley & Ashner, Washington, D.C., said that the decision was interesting because the high court did not originally grant certiorari on the plan documents rule issue.

Marshal S. Willick, a family law attorney with the Willick Law Group in Las Vegas, said he wished that the court had limited its review only to the issue on which it originally granted certiorari—whether a QDRO is the sole means by which a pension plan participant can assign his or her benefits in divorce without violating ERISA's anti-alienation clause.

The court's decision favored plan convenience and simplicity at the expense of equity by holding that when a plan has rules, procedures, and forms through which a participant can change a beneficiary designation, the plan documents control over any attempted waiver by the ex-spouse in a divorce decree, Willick said. The decision, he said, will make plan administrators' lives easier and divorce lawyers' lives harder.

Willick said that the ruling was especially odd because the majority of the high court's opinion addressed why the divorce decree waiver of survivorship benefits was not a prohibited alienation or assignment.

That decision was actually narrow as it applied only to defined contribution plans in which there is a clear provision for the post-retirement/post-divorce waiver of a beneficiary designation, Willick said. ''My guess is that it is a small minority of plans throughout country,'' he said.

Willick added that the decision left open several questions, including whether the estate could have brought an action in state court against the ex-wife to obtain benefits after they were distributed.

Post-Payment Litigation. Attorney Wayne Jacobsen of O'Melveny & Myers in Newport Beach, Calif., asked Willick if, when drafting divorce decrees, he tries to address issues involving post-payment litigation. In response, Willick said that when divorce lawyers divide up their clients' assets and property, they presume that the state court order will be followed and money will be distributed the way it is supposed to as spelled out in the divorce decree. Usually these sorts of issues occur post-divorce, Willick said. The question, Willick said, is whether the intended payee (or estate) can recover the money by going after the person who actually received it. That question is currently unknown, he said.

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In *Kennedy*, post-payment litigation would not have worked because the ex-wife had spent all of the money she received, Willick added.

Potential Plan Provisions. During the audioconference, Jacobsen suggested three possible post-*Kennedy* beneficiary provisions for plan documents that plan sponsors and administrators could put into their documents to address the plan documents rule:

- draft plan documents to expressly provide that the plan will honor extrinsic waivers of benefits contained in divorce decrees;
- draft plan documents to provide that plan administrators will not follow anything outside the plan's normal procedure for designating plan beneficiaries; or
- in the event of a divorce, make a default rule to remove as a beneficiary the former spouse, so that there is a greater likelihood of the benefits going to the appropriate person.

Jacobsen said that out of these options, the least safe option to the plan administrator or sponsor would be to honor non-QDRO waivers. That option puts administrators and sponsors in the position of having to determine what the waivers mean, he said.

The plan involved in the *Kennedy* case allowed the participant, once divorced, to name a new beneficiary, according to Jacobsen. Presumably, the participant could have named his former spouse as the beneficiary, notwithstanding the divorce decree, he said. He cautioned that figuring out the scope of an extrinsic waiver, then, can be difficult.

Jacobsen said, and Willick agreed, that sometimes a divorcing plan participant purposefully does not change his or her beneficiary designation because the participant wants to provide for the divorced spouse who waived his or her rights to the participant's benefits. However, very often, Willick said, once a spouse gets divorced, he or she no longer wants to think about the divorce or the former spouse, and simply puts off or forgets to change a beneficiary designation.

Rosenzweig agreed with Jacobsen that it would be risky to allow plan administrators to honor non-QDRO waivers. Rosenzweig said administrators would have to evaluate whether the waivers were knowing and voluntary. Also, if a divorce decree was entered in one state but plan documents require the law of another state or federal law to be applied, this could increase the risk and potential liability of plan administrators as well as the cost of plan administration, she said. She added that she would not recommend this option to her clients.

Willick added that including plan language to ensure a plan against potential challenges will almost always run contrary to divorce lawyers' attempts to craft divorce settlements. In response, Jacobsen suggested adding to plan documents express language as to court orders stating that any purported attempt to designate a beneficiary by means other than that allowed by a plan will be void and will have no effect. Other language could state that a beneficiary cannot be designated through court orders, Jacobsen said.

Default Language. Jacobsen also suggested default language stating that in the event of a divorce, the ex-spouse will be treated as having predeceased the participant and benefits will go to a secondary designated beneficiary or to a participant's estate. Such default language would remove an administrator's need to examine extrinsic documents, Jacobsen said. This could address the situation of the ''forgetful participant,'' who divorces and then forgets to change the beneficiary designation, he added.

Some of his plan sponsor clients have responded favorably to a default rule while others want plan language making it clear that a participant has the responsibility of changing beneficiary designations in the event of a divorce, Jacobsen said.

Jacobsen said that such default rules could also work for cash balance plans.

Key Is Disclosure. Rosenzweig said that the main thing to take away from *Kennedy* is that employers and plan sponsors must review plan provisions in their plan documents to make sure those documents are clear and unambiguous as to the procedures for designating beneficiaries and changing beneficiary designations. This is especially true with summary plan descriptions, as they must be distributed to plan participants and written in manner that can be easily understood, she said.

Plan documents must also clearly outline default provisions, if any, Rosenzweig said. The most important thing is to minimize potential litigation that can result when a participant dies without updating a beneficiary designation after divorce, remarriage, or if a participant is widowed.

Materials that plan sponsors hand out in connection with QDRO procedures should also include a section that discusses waivers and beneficiary designations, Rosenzweig added.

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