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Who Is Entitled to Survivor Benefits from ERISA Plans?, 40 J. Marshall L. Rev. 919 (2007)

Albert Feuer

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WHO IS ENTITLED TO SURVIVOR BENEFITS FROM ERISA PLANS?

ALBERT FEUER*

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I. INTRODUCTION

The Supreme Court stated in 2001, in *Egelhoff v. Egelhoff*,¹ that a core Employee Retirement Income Security Act (ERISA) concern is the “ERISA command,” that ERISA fiduciaries make payments to the beneficiary who is “designated by a participant or by the terms of [the] plan.” Thus, the Supreme Court held that ERISA preempted a state law which attempted to revoke an ERISA plan participant’s designation of his spouse upon his divorce. The Supreme Court ruled in 1997, in *Boggs v. Boggs*,² that ERISA preempts a state law which attempts to give a participant’s spouse the right to dispose of part of the pension benefits of the participant upon the spouse’s death. In both *Egelhoff* and *Boggs*, the Supreme Court held that the claimants were not entitled to the benefits either directly from the ERISA plans or indirectly from the beneficiary designee. The Supreme Court held that the claimants were not even entitled to obtain payments from any funds that the beneficiary had in addition to the benefit payments, because such entitlements would “render the award of title [to the benefits] meaningless.”³

ERISA plans must include two beneficiary designations.⁴ Both statutory designations are limited to pension plans.⁵ The first designation provides a participant’s spouse with survivor benefits, which may only be waived with the spouse’s written consent.⁶ The second one provides a participant’s spouse, former spouse, children, or other dependents with survivor benefits and/or other plan benefits by means of those domestic relations orders that meet the requirements of qualified domestic relations orders (“QDROs”).⁷ This Article discusses these two benefit designations.

Despite the clear ERISA mandate that plan beneficiary designations determine who gets and may keep ERISA plan benefits,⁸ many state and federal courts have held to the contrary in spite of *Boggs* and *Egelhoff*.⁹

1. *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001).

2. *Boggs v. Boggs*, 520 U.S. 833, 853 (1997).

3. See *Boggs*, 520 U.S. at 853 (quoting *Free v. Bland*, 369 U.S. 663, 669 (1962), a unanimous Supreme Court decision that preempted a state law and thereby upheld a savings bond designation).

4. ERISA §§ 205(a), 206(d)(3)(A); 29 U.S.C. § 1055(a), 1056(d)(3)(A) (2000).

5. Both are contained within Part 2 of Subtitle B of Title I of ERISA, which is limited to pension plans. ERISA § 201; 29 U.S.C. § 1051 (2000).

6. ERISA § 205(a); 29 U.S.C. § 1055(a) (2000).

7. ERISA § 206(d)(3)(A); 29 U.S.C. § 1056(d)(3)(A) (2000).

8. We are not considering claims based upon beneficiary designations that are ambiguous on their face. Such claims are resolved by resorting to the plan terms to determine who is the designated beneficiary.

9. Prior to *Boggs* and *Egelhoff*, courts and commentators raised serious questions about the significance of the benefits mandate. See George A. Norwood, *Who Is Entitled to Receive a Deceased Participant’s ERISA*

This Article argues in favor of three propositions. First, agreements by participants to make or retain beneficiary designations, whether or not part of state court orders, do not give non-designees the right to obtain plan benefits described in those agreements either directly from the ERISA plan or indirectly from the plan designee.¹⁰ The Supreme Court so held, in 1981 in *Ridgway v. Ridgway*,¹¹ which was cited in *Boggs*,¹² with respect to a beneficiary designation under the (non-ERISA) life insurance made available to members of the United States military. Second, “waivers” by spouses of interests to ERISA plans, which are part of marital dissolution agreements, whether or not part of state court orders, do not give anyone other than the designee the right to obtain plan benefits either directly from the plan or indirectly from the plan designee. Such waivers are voided by both the ERISA beneficiary designation mandate and the ERISA prohibition on the alienation of ERISA pension benefits. Third, designees who kill participants do not thereby give anyone other than the designee the right to obtain plan benefits either directly from the plan or indirectly from the plan designee.¹³

There is no convincing statutory or common law basis for the contrary propositions.¹⁴ Many of the arguments in favor of the contrary propositions are policy arguments rather than arguments based on the law as interpreted by the Supreme Court. These

Retirement Plan Benefits – an Ex-Spouse or Current Spouse? The Federal Circuits Have an Irreconcilable Conflict, 33 GONZ. L. REV. 61 (1997) (discussing the law as understood by many courts prior to *Boggs* and *Egelhoff*); see also Jayne E. Zanglein, *When Worlds Collide: The Intersection of Property Laws and ERISA Chapter 10.4—Beneficiary Designations*, 58-2-10 NYU ANNUAL INSTITUTE ON FED. TAX. § 10.04 (2000) (discussing the law as understood by many courts prior to *Egelhoff*).

10. QDROs, as discussed *infra*, are benefit designations. Thus, they do not require participants to make or retain any beneficiary designations.

11. 454 U.S. 46 (1981). Plans for military personnel are not ERISA plans, *infra*.

12. *Boggs*, 520 U.S. at 853.

13. There are exceptions for (a) plans which have such terms, or (b) if a generally applicable criminal law provides for such forfeiture.

14. See, e.g., *Guardian Life v. Finch*, 395 F.3d 23 (5th Cir. 2004) (defending many of the stated holdings). See generally, Jeffrey Gorris, *Comment, Waivers of ERISA Plan Benefits: Preventing Judicial Interpretations of a Complex Statute from Frustrating the Statute’s Simple Purpose*, 155 U. PA. L. REV. 717 (Jan. 2007); accord Keron A. Wright, “*Stuck on You*”: *The Inability of an Ex-Spouse to Waive Rights Under an ERISA Pension Plan [McGowan v. NJR Serv. Corp., 423 F.3d 241 (3d Cir. 2005)]*, 45 WASHBURN L.J. 687 (Spring 2006). Cf. David S. Lebolt, “*Making the Best of Egelhoff: Federal Common Law for ERISA-Preempted Beneficiary Designations*,” 28 J. PEN. PLAN. AND COMP. 29 (2002) (proposing a federal common law approach is proposed which appeals to prevailing national standards, such as the various Restatements of law, rather than the diverse and preempted state laws).

arguments, as the Supreme Court indicated in *Ridgway*¹⁵ and *Boggs*,¹⁶ are best directed at Congress, which has the authority to add or modify statutory beneficiary designations.

II. ERISA'S PURPOSE, COVERAGE, PROTECTION AND PREEMPTION

ERISA Section 2: Congressional Findings and Declaration of Policy states:

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; . . . that the continued well-being and security of millions of employees and their dependents are directly affected by those plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that owing to the lack of employee information and adequate safeguards concerning their operation, *it is desirable in the interests of employees and their beneficiaries*, and to provide for the general welfare and the free flow of commerce, that disclosure be made and *safeguards be provided with respect to the establishment, operation and administration of such plans*. . . .¹⁷

A. ERISA Purpose and Coverage

ERISA was a response to the protests on behalf of many employees and their beneficiaries who had been deprived of anticipated pension and welfare benefits. Under the pre-ERISA rules, many participants and beneficiaries who qualified for pension or welfare benefits were not paid their promised benefits because:¹⁸

(a) participants and beneficiaries were not generally entitled to the disclosure of plan terms and conditions, their benefits, or the financial condition of their plans;

(b) no general federal standards required persons operating such plans to pay promised benefits or to avoid transactions which would dissipate plan assets; and

(c) participants and beneficiaries had no federal right to appeal benefit denials either within the plan or to the courts unless they participated in certain collectively bargained plans.¹⁹

15. *Ridgway*, 454 U.S. at 62-63.

16. *Boggs*, 520 U.S. at 854.

17. ERISA § 2(a) (2000) (emphasis added).

18. See, e.g., Employee Benefits Law, Introduction to the First Edition (2000) XCIV-XCV.

19. Benefit denials by collectively bargained plans administered jointly by representatives of the union and the employer or employers could be challenged as violations of Section 302 of the National Labor Relations Act, 20

ERISA, which was signed into law on Labor Day of 1974, protects both plan participants and their beneficiaries. Participants generally include²⁰ any employee or former employee of an employer who is or may become eligible to receive an ERISA plan benefit, such as a lifetime pension benefit, or whose beneficiaries may be eligible to receive an ERISA plan benefit, such as survivor benefits from either a pension plan or a life insurance plan. A beneficiary is defined as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may be entitled to a benefit thereunder."

ERISA does not cover all employers. Governmental plans are not subject to ERISA.²¹ Church plans are not subject to ERISA unless the plans elect to be covered.²² Moreover, ERISA does not cover employee benefit plans whose only participants are the owners and the spouses of the owners of the trade or business sponsoring the plan.²³ It is irrelevant whether the plan sponsor is a corporation, a partnership, or an incorporated entity.²⁴

ERISA applies to (1) pension plans,²⁵ a category that includes profit-sharing and 401(k) plans, and (2) welfare plans,²⁶ including

U.S.C. § 186. This Section permits the establishment and operation of jointly administered employee benefit plans. Beneficiaries, however, had to show the determination was arbitrary and capricious. There was also no protection against employer retaliation. *See also* Firestone Tire & Rubber v. Bruch, 489 U.S. 101, 108-11 (1989).

20. ERISA § 3(7); 29 U.S.C. § 1002(7) (2000).

21. ERISA § 4(b)(1), 29 U.S.C. § 1003(b)(1) (2000).

22. ERISA § 4(b)(2), 29 U.S.C. § 1003(b)(2) (2000).

23. 29 C.F.R. §§ 2510.3-3(b) and (c). If there are other participants, then the owner and the owner's spouse are provided with the ERISA protections, such as the protection of the pension plan assets of a bankrupt participant. *Yates M.D., P.C. Profit-Sharing Plan v. Hendon*, 541 U.S. 1 (2004).

24. *Id.*

25. *See* ERISA § 3(2); 29 U.S.C. § 1002(2) (2000) (defining pension plans as plans which provide retirement income to employees or result in the deferral of income by employees for periods extending to the termination of covered employment, although under certain circumstances severance plans arrangements are treated as welfare plans rather than as pension plans). Employees may but need not be able to obtain distributions from pension plans before the termination of employment. Profit-sharing plans often permit such in-service distributions, although 401(k) plans may only permit the in-service distribution of employee contributions. *Id.* However, certain unfunded pension plans known as excess benefit plans are excluded from ERISA coverage. ERISA § 4(b)(5), 29 U.S.C. § 1003(b)(5) (2000).

26. ERISA § 3(1); 29 U.S.C. § 1002(1) (2000) (defining welfare plans as plans which provide participants or their beneficiaries with medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds or prepaid legal services). These plans do not include payroll practices, such as sick pay, holiday pay, jury pay or overtime. 29 C.F.R. § 2510.3-1b(3) (2001); *see also* *Mass. v. Morash*, 490 U.S. 107 (1989) (drawing a distinction between the

medical, disability, life insurance, and severance plans. For simplicity, all such plans by covered employers will be herein denoted as ERISA plans.

ERISA does not require employers to establish any ERISA plans, but it does impose minimum standards on the establishment and operation of any covered employee benefit plans that employers choose to adopt.²⁷

Defined contribution pension plans ("DC Plans")²⁸ are pension plans in which each participant has an individual account.²⁹ DC plans include money purchase pension plans,³⁰ profit-sharing plans,³¹ and 401(k) plans.³² A participant's benefits in a DC plan are expressed in the form of a lump sum equal to the value of the participant's account at the time at issue. The plan terms may, however, permit benefits to be paid in a form other than a lump sum, such as a life annuity beginning either at once or at some future time.

ERISA coverage of welfare benefit plans and the customary unfunded vacation benefit plans, which are not covered by ERISA).

27. *See, e.g.*, *Esden v. Bank of Boston*, 229 F.3d 154, 172 (2d Cir. 2000). These standards do not, however, apply to unfunded plans which are maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. ERISA §§ 201(2), 401(a)(1); 29 U.S.C. §§ 1051(2), 1101(a)(1). Those plans are often called top-hat plans. *See, e.g.*, *In re IT Group, Inc.*, 448 F.3d 661 (3d Cir. 2006) (discussing the characteristics of such plans, particularly their unfunded nature). Such plans are often called non-qualified because they do not qualify for the favorable tax treatment that is generally provided to ERISA deferred compensation plans. *Id.*

28. ERISA § 3(34); 29 U.S.C. § 1002(34) (2001). A participant's benefits in such plans are based solely upon the sum of (1) the amounts contributed to the participant's account and any income, expenses, gains, and losses, and (2) any forfeiture of other participants' accounts allocated to such participant's account. All investment risk is placed on the participant, who benefits from investment gains and suffers from investment losses. Thus, a participant's accrued benefits, namely the participant's account balance, may either increase or decrease in the course of a year. Benefits may be and are usually made available on a participant's termination of employment. Distributions may be also permitted prior to the termination of such employment. *See generally id.*

29. It is also possible for welfare plans to provide participants with individual accounts such as flexible spending arrangements or cafeteria plans which permit participants to allocate fixed amounts among a set of welfare benefits.

30. A plan in which the annual contributions are fixed by a plan formula. Treas. Reg. § 1.401-1(b)(1)(I) (2005).

31. A plan in which the annual contributions are not fixed by a plan formula but need not be based on profits. Treas. Reg. § 1.401-1(b)(1)(I) and IRC § 401(a)(27) (2005).

32. A plan in which employees may make pre-tax contributions to the plan pursuant to the terms of IRC § 401(k) and the regulations thereunder.

Defined benefit pension plans (“DB Plans”)³³ are pension plans in which participants do not have individual accounts.³⁴ A participant’s benefits in DB plans are expressed in the form of a life annuity beginning at the participant’s normal retirement age.³⁵ The annuity is called the participant’s normal retirement benefit and is derived from a formula that usually includes the participant’s compensation and years of service.³⁶ The plan terms may, however, permit benefits to be paid in a form other than a life annuity, such as a lump sum payment.

B. General ERISA Protections

ERISA requires that each employee benefit plan be established and maintained pursuant to a written instrument.³⁷ The Supreme Court characterized this mandate as:

[One of] ERISA’s core functional requirements [is], that “every employee benefit plan shall be established and maintained pursuant

33. ERISA § 3(35); 29 U.S.C. § 1002(35) (2000).

34. *But see* Erika Lunder, *CRS Report for Congress, Cash Balance Pension Plans-Selected Legal Issues* (Updated July 29, 2005); Patrick J. Purcell, *CRS Report for Congress, Pension Issues: Cash Balance Plans*, (Updated August 7, 2003) (providing a discussion of hybrid plans in which a participant’s benefit in a DB plan may appear to be an individual account). Under Section 701 of the Pension Protection Act of 2006, Pub. L. No. 109-80, 120 Stat. 780 (2006) (the “PPA of 2006”), a wider range of such plans are permitted.

35. *See generally* ERISA § 3(24); 29 U.S.C. § 1002(24) (2000) (providing the definition of a participant’s normal retirement age. *See also* *Laurent v. PriceWaterhouseCoopers LLP*, 448 F. Supp. 2d 537, 545-46 (S.D.N.Y. 2006) (providing an extensive discussion of the significance of the phrase, “normal retirement age”).

36. The plan need not permit lump sum payments of plan benefits. However, many plans permit lump sum payments of the value of the annuities as of the date of the payment, which may be as of the participant’s normal retirement age or as of another date. A participant’s accrued benefits, namely the annuity beginning as of the participant’s normal retirement age, may not decrease in a year. For example, a participant who has accrued a \$1,000 annual lifetime annuity beginning as of the participant’s normal retirement age may not find that such benefit will decrease at any later time. All investment risk is placed on the employer, who benefits from investment gains and suffers from investment losses. Benefits may be but are often not made available when a participant terminates employment for a reason other than death, although distributions are not generally permitted prior to such employment termination. *See also* Prop. Treas. Reg. §§ 1.401(a)-(1)(b)(1)(iv) and 1.401(a)-3 (2005) (setting down conditions under which participants may receive plan distributions prior to a termination of employment, but during a phased retirement); Section 905 of the PPA of 2006 (permitting phased retirements under certain conditions).

37. ERISA § 402(a)(1); 29 U.S.C. § 1102(a)(1) (2000). These standards do not, however, apply to unfunded plans which are maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. ERISA § 401(a)(1); 29 U.S.C. § 1101(a)(1) (2000).

to a *written instrument*.” 29 U.S.C. § 1102(a)(1) (emphasis added). In the words of the key congressional report, “[a] written plan is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan.”³⁸

The written instrument must “specify the basis on which payments are made to and from the plan.”³⁹ In particular, the plan must specify both the plan benefits and who is entitled to those benefits. Thus, the Supreme Court in *Egelhoff*⁴⁰ described the ERISA requirement that plan benefits be determined by the plan terms as a core ERISA mandate (the “Plan Terms Benefit Mandate”). No other document may generally be considered in such determinations unless the plan references the other document.⁴¹ Moreover, ERISA requires that plans include certain provisions, such as the pension benefit protections, *infra*, and the statutory claims procedure,⁴² which must be followed whether or not the plan expressly includes them.

ERISA has more specific protections for pension benefits than welfare benefits,⁴³ as is suggested by the inclusion of the term “retirement” in the name of the ERISA statute.⁴⁴ These additional

38. *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73, 83 (1995). It sufficed therein for a plan amendment procedure to be described as being performed by the company. The underlying issue was whether the plan sponsor retained the right to amend post-retirement benefits.

39. ERISA § 402(b)(4); 29 U.S.C. § 1102(b)(4) (2000).

40. 532 U.S. 141, 147 (2001).

41. *Id.* at 148. Health care benefit plans often explicitly permit participants and beneficiaries to use specified agreements to assign their benefits to health care providers. Some pension plans permit participants to designate the beneficiary of their survivor benefits with a reference to a will or trust agreement. In such a case, the referenced agreement must be considered to determine participant's designee or designees. *Id.* Participants may also rely on summary plan descriptions to establish plan rights that are inconsistent with the plan terms, under certain conditions. *See e.g.*, *Burker v. Kodak*, 336 F.3d 103 (2d Cir. 2003) (discussing the conditions unmarried couples had to satisfy in order to qualify for plan benefits).

42. ERISA § 503; 29 U.S.C. § 1133 (2000).

43. Plans may provide both pension benefits and welfare benefits, such as “pension plans” which provide disability benefits to participants during the participant's disability rather than for life. Those disability benefits are thus welfare benefits rather than pension benefits). The pension plan protective provisions apply only to the pension benefits but not to the welfare benefits, whether provided by a pension plan or a welfare plan. *See, e.g.*, *McBarron v. S & T Indus., Inc.*, 771 F.2d 94, 98 (6th Cir. 1985) and *Rombach v. Nestle USA, Inc.*, 211 F.3d 190, 193-94 (2d Cir. 2000).

44. The protective provisions are set forth in Parts 2 and 3 of Subtitle B of Title I of ERISA and Title IV of ERISA. *See also* Albert Feuer, *When Are Releases of Claims for ERISA Plan Benefits Effective?*, 38 J. MARSHALL L. REV. 773, 811-18 (Spring 2005) (providing a more extensive discussion of these protections). These parts do not apply to welfare plans. ERISA §§ 201(1), 301(1), 4021; 29 U.S.C. §§ 1051(1), 1081(1), 1321 (2000). Nor do they apply to

protections are designed to assure that pension benefits will be available to pay the retirement expenses of the participant and his or her beneficiaries.⁴⁵ Moreover, a federal government agency, the Pension Benefit Guaranty Corporation (the "PBGC"), insures DB plans.⁴⁶ Thus, such benefits will not be placed at risk if, for any reason, an insured pension plan lacks sufficient assets to pay all of the plan's guaranteed benefits.⁴⁷ By contrast, benefits from DC plans or welfare plans are not federally insured.

ERISA imposes four significant plan design and operating restrictions on pension plans that are inapplicable to welfare plans:

(A) After being employed for at least a short statutory period, employees must start to accrue pension benefits.⁴⁸ A significant portion of pension benefits must accrue in the early years of employment.⁴⁹ Thus, the benefits may not be endangered by an employee's termination of employment prior to reaching the plan's retirement age.

(B) After being employed for at least a short statutory period, the employee's pension benefits may not be forfeited.⁵⁰ Thus, the benefits may not be endangered by a sponsor's plan provision or an administrator's plan practice.

(C) Pension plans must meet minimum advance funding requirements.⁵¹ Thus, the benefits may not be endangered by the employer's failure to put aside sufficient funds to satisfy the plan's expected obligations.

(D) Pension assets may only be assigned under very limited circumstances.⁵² Thus, the benefits may not be endangered by a participant or beneficiary assuming an obligation voluntarily or involuntarily. This is the only protection that affects parties other

top-hat plans. *See supra* note 32. They also do not apply to plans confined to the owner-employee and his or her spouse, which are exempt from ERISA. The latter, if tax-qualified are often protected by state creditor law protections such as NY CPLR §§ 5205(c)(2), (d)(1) (2007).

45. *Nachman v. PBGC*, 446 U.S. 359, 375 (1980). The Court held that (1) ERISA protected pension benefits are not limited to pension plan assets, and (2) the Pension Benefit Guaranty Corporation (the "PBGC"), which guarantees certain benefits, may recover from a pension benefit plan sponsor any difference between the benefits the corporation guarantees and the plan assets available to pay plan benefits. *Id.* For plans terminating in 2007 (2008), the PBGC guarantees a single life monthly annuity of \$4,125 (\$4,132.50) beginning at age 65. ERISA Reg. § 4011.11.

46. ERISA §§ 4001-4402; 29 U.S.C. §§ 1301-1461 (2000).

47. *See supra* note 45.

48. ERISA § 202; 29 U.S.C. § 1052 (2000).

49. ERISA § 204; 29 U.S.C. § 1054 (2000).

50. ERISA § 203; 29 U.S.C. § 1053 (2000).

51. ERISA §§ 301-308; 29 U.S.C. §§ 1081-1086 (2000).

52. ERISA § 203; 29 U.S.C. § 1053 (2000).

than participants, beneficiaries or pension plans. Those parties may not collect debts of participants or beneficiaries from their pension plan benefits, whether or not the participants or beneficiaries have tried to assign such benefits.

Welfare plans may be designed and operated in a manner that violates one or more of those requirements because they are not subject to these requirements. For example, medical plans may provide that (1) benefit entitlements are forfeited if claims are not made within a certain number of days after the claim arises, or (2) assignments of medical claims to medical care providers are permitted. On the other hand, medical plans, like all ERISA plans, must follow the Plan Terms Benefit Mandate. Thus, they must provide the benefits in accord with the plan terms.⁵³

There are two important protections that apply to both pension plans and welfare plans in addition to the written plan requirement and the Plan Terms Benefit Mandate.⁵⁴ First, plan assets must be held in trust.⁵⁵ Thus, the benefits may not be endangered by a sponsor's weak financial position, which could otherwise permit a sponsor's creditor to obtain plan assets. Second, ERISA imposes stringent standards⁵⁶ on persons acting as ERISA fiduciaries. A person is a fiduciary for an ERISA plan to the extent:

- (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control regarding management or disposition of its assets,
- (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority to do so, or
- (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Such term includes any person designated under Section 405(c)(1) [fiduciary authority may be delegated in the plan governing

53. See ERISA § 404(a)(1)(D); 29 U.S.C. § 1104(a)(1)(D) (2000) (specifying that operations will be restrained by the requirement that fiduciaries follow the written plan terms).

54. Plans that are not subject to the written plan requirement or the Plan Terms Benefit Mandate, such as top-hat plans, are also not subject to the fiduciary or the trust requirements. As a result these plans may be designed and operated without complying with either of those requirements.

55. ERISA § 403; 29 U.S.C. § 1103 (2000). This provision also permits the assets to be held in insurance contracts, custodial accounts, or IRAs under certain circumstances. However, an issue may arise with self-insured plans, such as certain medical reimbursement plans, in which the trust requirement is inapplicable because there may be no plan assets until claims are paid.

56. *Donovan v. Bierwirth*, 680 F.2d 263, 272, n.8 (2d Cir. 1982) (opining that a fiduciary's duties under ERISA are "the highest known to law").

instrument].⁵⁷

Titles do not determine fiduciary status. However, persons with plan titles, such as a plan administrator or plan trustee, often have the authority, control or responsibility to be treated as engaged in fiduciary acts. Furthermore, a person may be a fiduciary whether or not he has any plan title.⁵⁸

The Supreme Court described the fiduciary duties of plan administrators:

[T]he *fiduciary obligations of plan administrators* are to serve the interest of participants and beneficiaries and, specifically, to *provide them with the benefits authorized by the plan*.⁵⁹

Administrators thus have a fiduciary obligation to adhere to the ERISA Plan Terms Benefit Mandate, which the Supreme Court described in *Egelhoff*,⁶⁰ as “a central matter of plan administration.”

ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1),⁶¹ governs the manner by which an ERISA fiduciary must fulfill its ERISA obligations. The fiduciary must:

discharge his duties with respect to a plan solely in the interest of

57. ERISA § 3(21); 29 U.S.C. § 1002(21) (2000).

58. Persons performing ministerial functions within a framework of policies, interpretations, rules, practices and procedures made by other persons are not thereby engaged in fiduciary acts. By contrast, the persons establishing and maintaining the framework are engaged in fiduciary acts. 29 C.F.R. § 2509.75-8, D-2, D-3 (2005). *See, e.g.*, *Christensen v. Quest Pension Plan*, 462 F.3d 913 (8th Cir. 2006) (holding that the plan fiduciaries had fulfilled their fiduciary responsibilities in supervising a party who provided an excessive benefit estimate to a participant prior to the employee’s retirement). Therefore, the fiduciaries incurred no liability as a result of such faulty estimate. *Id.*

59. *Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43 (1985) (emphasis added). In that case, the Supreme Court concluded that the “panoply of remedial devices” ERISA places at the disposal of a participant who did not receive her promised benefits did not include a cause of action for extra-contractual damages caused by improper or untimely processing of benefit claims. *Id.* This holding, but not the statement describing and administrator’s fiduciary obligations, was criticized severely by John Langbein, *What ERISA Means by “Equitable”: The Supreme Court’s Trail of Error in Russell, Mertens and Great-West*, 103 COLUM. L. REV. 1317 (2003).

60. 532 U.S. 141, 147 (2001).

61. These rules were designed to take into account the special nature and purpose of employee benefits plans, whose beneficiaries required more protection than the beneficiaries of other trusts. H.R. Rep. No. 1280, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 5038, at 5083. ERISA’s enhancements of existing trust law include the imposition of duties upon a broader class of fiduciaries, ERISA § 3(21), 29 U.S.C. § 1002(21) (2000); broad disclosure and reporting requirements, *id.* at § 1021-31 and the prohibition of exculpatory clauses; *id.* at § 1104(a)(1)(D) and 1110(a). *See generally* H.R. REP. NO. 93-533, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. at 4649-51.

the participants and beneficiaries and—

(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title [entitled “Protection of Employee Benefit Rights”] and title IV [entitled “Plan Termination Insurance”]

The final paragraph requires fiduciaries to follow ERISA mandates, whether or not those mandates are explicitly set forth in the plan.⁶²

C. ERISA Preemptions and the Establishment of Uniform National Benefit Entitlements for Participants and Beneficiaries

The United States Constitution’s Supremacy Clause⁶³ provides that federal law supersedes any conflicting state law (“Conflict Preemption”).⁶⁴ Under Conflict Preemption, ERISA would supersede a state law which contradicts the ERISA minimum participation standards for pension plans,⁶⁵ or the ERISA minimum vesting standards for pension plans.⁶⁶ In particular, Conflict Preemption would supersede a state statute permitting pension benefits to be forfeited if a participant is credited with less than ten years because ERISA only requires six

62. Michael Gordon, one of the staff members who helped draft ERISA wrote that this paragraph “may be ERISA’s single most important fiduciary provision.” *Employee Benefits Law, Introduction to the First Edition* (2000) XCV.

63. U.S. CONST. art. VI, cl. 2.

64. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (a New York law giving exclusive privileges to operate steamboats in New York waters was voided because it conflicted with Congressional statutes licensing those engaged in coastal trade). *But see Alessi v. Raybestos-Manhattan*, 451 U.S. 504 (1981) (Supreme Court holding that a New Jersey law prohibiting pension benefit offsets for New Jersey workers compensation awards was preempted because ERISA permitted such offsets but also discussed the Court’s reluctance to apply the federal supremacy clause).

65. ERISA § 202; 29 U.S.C. § 1052 (2000).

66. ERISA § 203; 29 U.S.C. § 1053 (2000).

years.⁶⁷ However, Conflict Preemption has no effect on state laws which pertain to but do not contradict those ERISA standards. In particular, Conflict Preemption would not supersede a statute setting more stringent minimum participant or vesting standards than ERISA sets for pension plans or even one setting minimum participation or vesting standards for welfare plans.⁶⁸

There is also an implicit preemption for federal statutes, called field preemption (“Field Preemption”), which the Supreme Court described as follows in *Rice v. Santa Fe Elevator Corp.*:

Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was *the clear and manifest purpose of Congress*. Such a purpose may be evidenced in several ways. *The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.* Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute. It is often a *perplexing question* whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed *except as the state and federal regulations collide*.⁶⁹

This “perplexing question” often leads to considerable disagreement about whether a state law is superseded by ERISA under Field Preemption. For example, does field preemption apply to state laws imposing minimum participation standards for welfare plans?⁷⁰ On the other hand, any state law which conflicts with ERISA is subject to Field Preemption, because the conflict shows Congress had a clear and manifest purpose to supersede such state law.

ERISA § 514(a), 29 U.S.C. § 1144(a), (the “ERISA Explicit Preemption”) is not limited to Conflict Preemption and Field Preemption. The ERISA Explicit Preemption generally provides

67. ERISA § 203(a)(2); 29 U.S.C. § 1053(a)(2) (2000).

68. We are disregarding the limited state regulation of insured plans, including welfare plans, which ERISA permits and will be discussed, *infra*.

69. 331 U.S. 218, 230-31 (1947) (emphasis added; citations omitted) (deciding that the United States Warehouse Act superseded state regulation of only those matters that the act expressly regulated).

70. See, e.g., Donald T. Bogan, *Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States to Regulate Managed Care?*, 74 TUL. L. REV. 951 (Feb. 2000) (arguing that because ERISA does not substantively regulate welfare plans ERISA should not apply field preemption to state regulation of welfare plans). Professor Bogan therein also disagrees with much of the preemption analysis of ERISA set forth in this Article. *Id.*

that ERISA “supersedes any and all state laws insofar as they may relate to” any ERISA plan. Field Preemption, which includes Conflict Preemption, is part of the Explicit ERISA Preemption because any state law which Congress had a clear and manifest purpose to supersede with ERISA, must relate to ERISA. The term “state law” includes all laws, decisions, rules, regulations, or other state action having the effect of law of any state.⁷¹ State laws are often enforced with state court orders. Thus, such orders are preempted under the same standards as explicit state laws.

There is an obvious exception to the Explicit ERISA Preemption for any state laws to which plan terms refer. For example, the terms of a life insurance plan may provide if a participant has made no effective designation, the proceeds shall be distributed in accord with the law of intestacy of a specified state. On the other hand, a plan may not incorporate state laws that violate any ERISA mandates; thus a provision that an ERISA plan be interpreted by the laws of a certain state only applies to the extent such laws are consistent with ERISA.

There are two major general state law exclusions from the Explicit ERISA Preemption. These exclusions also apply to Conflict Preemption and Field Preemption, which are both included within the Explicit ERISA Preemption. First, there is an exclusion for state laws regulating insurance.⁷² This exclusion does not pertain to the state laws determining the rights of designees of insured plans.⁷³ There is also an exclusion from preemption for generally applicable criminal laws of the states.⁷⁴ This exclusion applies to general criminal laws, such as larceny and embezzlement laws. It may not be used to regulate employee benefit plans by criminalizing employee benefit requirements, such as criminalizing the failure of corporate officers to insure that

71. ERISA § 514(c)(1); 29 U.S.C. § 1144(c)(1) (2000).

72. ERISA § 514(b)(2); 29 U.S.C. § 1144(b)(2) (2000). This section also includes exclusion for state laws regulating banking or securities. See Matthew G. Vansuch, Note, *Not Just Old Wine in New Bottles: Kentucky Ass’n of Health Plans, Inc. v. Miller Bottles a New Test for State Regulation of Insurance*, 38 AKRON L. REV. 253 (2005) (providing a more extensive discussion of the insurance exemption); see also Donald T. Bogan, *ERISA: State Regulation of Insured Plans After Davila*, 38 J. MARSHALL L. REV. 69 (2005) (explaining the same).

73. The Supreme Court unanimously decided that a state law deemed to be a “law . . . which regulates insurance” must: (1) be directed specifically directed toward entities engaged in insurance, and (2) substantially affect the risk pooling arrangement between the insurer and the insured. *Ky. Ass’n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003). Thus, the exemption does not affect the focus of this Article, the rights of beneficiary designees. See, e.g., *Egelhoff*, 532 U.S. 141 (2001), in which a state law pertaining to the designee of a life insurance plan was held to be preempted.

74. ERISA § 514(b)(4); 29 U.S.C. § 1144(b)(4) (2000).

prompt employer plan contributions are made.⁷⁵ There is no general exclusion for domestic relations laws, although there is a limited exclusion for orders obtained under such a law (including a community property law)⁷⁶ which pertain to either (1) pension plans and meet specified conditions for a QDRO,⁷⁷ or (2) medical benefit plans that meet specified conditions and are known as qualified medical care support orders.⁷⁸

The “relate to” preemption allows courts to overcome their traditional reluctance to find state laws are subject to Field Preemption⁷⁹ or Conflict Preemption.⁸⁰ For example, any state law that refers to ERISA plans relates to ERISA plans and is generally preempted, such as one that explicitly requires ERISA welfare plans to provide specified benefits, if, *arguendo*, the insurance exclusion from the Explicit ERISA Preemption is inapplicable.⁸¹ On the other hand, the Explicit ERISA Preemption does not preempt a state law with “only a tenuous, remote, or peripheral connection with covered plans.”⁸²

The minimum contours of the Explicit ERISA Exemption are established by the areas in which ERISA standards exist, and thereby establish Conflict Preemption. The Explicit ERISA Preemption does not limit preemption to Conflict Preemption, that is, cases in which the state statutes that relate to ERISA plans conflict with ERISA. This is a consequence of the fundamental canon of statutory interpretation set forth by the Supreme Court that statutes be interpreted using the “ordinary, contemporary,

75. See, e.g., *Sforza v. Kenco Constructional Contracting Co.* 674 F. Supp. 1493 (Conn. 1986) (criminal law exclusion rejected); *Blackburn v. Iversen*, 925 F. Supp. 118 (Conn. 1996) (statute imposing personal liability on officers preempted because it relates to ERISA plans but alter ego claim against officers permitted to go forward under ERISA).

76. ERISA § 514(b)(7); 29 U.S.C. § 1144(b)(7) (2000).

77. ERISA § 206(d)(3); 29 U.S.C. § 1056(d)(3) (2000). These are discussed in detail, *infra*.

78. ERISA § 609; 29 U.S.C. § 1169 (2000). This exclusion will not be discussed extensively because it does not pertain to survivor benefits, the primary focus of the Article, but to the rights of children to medical care benefits following a marital dissolution. *Id.*

79. As defined, *supra*.

80. See, e.g., *Alessi v. Raybestos-Manhattan*, 451 U.S. 504 (1981) (Supreme Court discussing its reluctance to apply the federal supremacy clause). *But see Egelhoff*, 532 U.S. at 152-53 (2001) (Scalia, J. and Ginsberg, J. concurring) (asserting that the Explicit ERISA Preemption is limited to the conflict preemption and field preemption of ERISA).

81. *Shaw v. Delta Airways*, 463 U.S. 85, 95-97 (1983).

82. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins.*, 514 U.S. 645, 661, 664 (1995) (state law imposing surcharges on plans other than Blue Cross was not preempted because the surcharges do not require medical care benefit plans to deal only with one insurer or to insure against an entire illness they may choose to omit).

common meaning” of words.⁸³ For example, the presence of participation and vesting standards for ERISA pension plans, which are employee benefit plans, implies that such standards relate to ERISA plans, whether or not they are pension plans. Consequently, under the Explicit ERISA Preemption, a state law containing explicit participation and vesting standards for welfare plans, which does not exclude ERISA welfare plans, would relate to ERISA plans and thus be preempted if, *arguendo*, the insurance exclusion is inapplicable, as is the case for beneficiary designations.⁸⁴ In particular, a state law that required that pension and welfare benefits always be vested would be preempted with respect to both ERISA pension and welfare plans. On the other hand, the Explicit ERISA Exemption does not prevent plans from adopting provisions consistent with ERISA’s requirements, such as vesting rules for retiree medical benefits.

Preventing the state regulation of ERISA plans with respect to issues that Congress decided to regulate only in part or with no specific mandates is consistent with both the statutory language and the Congressional intent. Such broad intent is shown by the fact that, as discussed, *infra*, one of the earlier versions of ERISA limited preemption to “subject matters regulated by this Act [ERISA].” Congress reserved regulation of employee benefit plans to the federal courts—not to the states, either individually or collectively, with the narrow exclusions described above. However, Congress was quite concerned about the deleterious effects of such possible inconsistencies as well as conflicts with ERISA.

One of the key sponsors of ERISA, Representative John Dent, described the ERISA Explicit Preemption as follows:

Finally, I wish to make note of what is to many *the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans*. With the preemption of the field, we round out the protection afforded participants by *eliminating the threat of conflicting and inconsistent State and local regulation*.⁸⁵

Similarly, Senator Harrison A. Williams, Chairman of the Senate Committee on Labor and Public Welfare, and another key ERISA sponsor emphasized the protective features of the ERISA Explicit Preemption when he declared:

It should be stressed that with the narrow exceptions specified in the bill, *the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations*,

83. *Bedroc Ltd., LLC v. United States*, 541 U.S. 176, 184 (2004) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

84. *See id.* at n.729.

85. 120 Cong. Rec. 29197 (1974) (emphasis added).

*thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans.*⁸⁶

In *Shaw v. Delta Airways*,⁸⁷ the Supreme Court pointed to the administrative advantage for participants of having uniform rules throughout the United States when it held that Explicit ERISA Preemption preempted a New York law that required ERISA disability plans⁸⁸ to provide maternity benefits because ERISA contained no such mandate at such time.⁸⁹ The unanimous court observed that if such statutes were not preempted, plan participants could be forced to shoulder the increased administrative burden of complying with multiple state requirements because employers may reduce plan benefits to pay for such burdens.⁹⁰ Moreover, the Court stated:

An employer with employees in several States would find its plan subject to a different jurisdictional pattern of regulation in each State [if the preemption provision were disregarded], depending on what benefits the State mandated under disability, workmen's compensation, and unemployment compensation laws. The administrative impracticality of permitting mutually exclusive pockets of federal and state jurisdiction within a plan is apparent.⁹¹

The Court set the stage for this statement by observing⁹² that the breadth of the Explicit ERISA Preemption was shown by the use of the words "relate to any employee benefit plan" in ERISA § 514(a), 29 U.S.C. § 1144(a), rather than the far more limited words that had been present in earlier versions of ERISA bills. Those bills limited preemption either to matters "[relating] to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any employee benefit plan." or "[relating] to the subject matters regulated by this Act." The Court had previously held that the ERISA preemption section prevents the states from enhancing the ERISA protections provided to plan participants and beneficiaries.⁹³

86. *Id.* at 29933 (emphasis added).

87. 463 U.S. 85 (1983).

88. Disability plans, which are maintained *solely* for the purpose of complying with local disability rules are exempt from ERISA coverage. ERISA § 4(b)(3); 29 U.S.C. § 1003(b)(3) (2000). The Court remanded the case to determine the applicability of this exemption. *Id.*

89. Such discrimination was prohibited as of April 29, 1979 by the federal Pregnancy Discrimination Act. The issue before the court was whether Delta Airways was obligated to pay the locally mandated benefits accruing before such date.

90. *Shaw*, 463 U.S. at 105, n.25.

91. *Id.* at 107-78.

92. *Id.* at 99, n.18.

93. *See, e.g., Alessi v. Raybestos-Manhattan*, 451 U.S. 504 (1981) (Supreme Court holding that a New Jersey law prohibiting pension benefit offsets for New Jersey workers compensation awards was preempted because ERISA

The Supreme Court similarly stated in *Fort Halifax Packing Co., Inc. v. Coyne*, that “Congress intended [ERISA] pre-emption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations.”⁹⁴ In *Egelhoff v. Egelhoff*,⁹⁵ the Supreme Court observed that the ERISA Plan Terms Benefit Mandate conflicted with a Washington law that required ERISA pension plans and insurance plans treat a spouse as having died at the time of divorce for purposes of applying their beneficiary designation provisions. The *Egelhoff* Court also explained why such law was preempted:

One of the principal goals of ERISA is to enable employers “to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.” *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9, (1987). Uniformity is impossible, however, if plans are subject to different legal obligations in different States. . . .

But differing state regulations affecting an ERISA plan’s “system for processing claims and paying benefits” impose “precisely the burden that ERISA pre-emption was intended to avoid.”⁹⁶

On the other hand, the rarity of ERISA decisions by the US Supreme Courts hinders the development of a uniform administrative scheme because courts may not always issue consistent decisions. It is possible for the eleven numbered circuit courts of appeal and the D.C. Circuit to reach conflicting decisions about benefit entitlements. The highest courts of the fifty state courts and the District of Columbia also have the authority to decide benefit claims.⁹⁷ The local courts need not defer to any federal circuit.⁹⁸ Thus, like the circuits, each such court may take

permitted such offsets).

94. 482 U.S. 1, 11 (1987). In that case the Court held that ERISA did not preempt the Maine requirement of a one-time severance payment on the closing of a plant because the employer could comply with such requirement without adopting any administrative scheme. *Id.* The lack of such a scheme meant there was no ERISA plan and thus all ERISA provisions, including preemption, were inapplicable, although four justices dissented because they believed ERISA did not impose such a stringent requirement to constitute an ERISA plan. *Id.*

95. 532 U.S. 141 (2001) (citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987)).

96. *Id.* at 148-49.

97. ERISA § 502(e)(1); 29 U.S.C. § 1132(e)(1) (2000) gives state courts of competent jurisdiction concurrent jurisdiction of such claims.

98. Justice Thomas, in a concurring Supreme Court opinion, stated that “a state trial court’s interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.” *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993). Divorce litigants often prefer to have all divorce issues, including entitlements to ERISA plan benefits decided by a single set of state courts rather than having to split the divorce issues between the state and federal courts.

its own approach to the same benefit issues, but also must defer to the U. S. Supreme Court.⁹⁹

III. RESTRICTIONS ON THE ASSIGNMENT AND ALIENATION OF ERISA PLAN BENEFITS

ERISA § 206 (d) Assignment or alienation of plan benefits

(1) *Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated . . .*

A. *ERISA Prohibits the Assignment and Alienation of Pension Benefits*

One of the key ERISA pension benefit protections is the prohibition on the assignment or alienation of pension benefits (the “Anti-Alienation Prohibition”).¹⁰⁰ Protection is not limited to participants. Plan beneficiaries are also protected against the assignment or alienation of those benefits.¹⁰¹ The Supreme Court therefore concluded unanimously that the Anti-Alienation Prohibition protects the pension benefits of participants¹⁰² and beneficiaries.¹⁰³

The Anti-Alienation Prohibition, which must be part of the terms of all covered pension plans,¹⁰⁴ prevents an individual from endangering his or her pension benefits in either of two distinct manners.

99. Furthermore, a summary dismissal by the Supreme Court of an appeal from a state court for want of a substantial federal question, when the federal question is properly presented and within the Supreme Court’s appellate jurisdiction under 28 U.S.C. § 1257(2), operates as a decision on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

100. ERISA § 206(d)(1); 29 U.S.C. § 1056(d)(1) (2000).

101. Treas. Reg. § 1.401(a)-13(c)(1)(ii) (2005). Under Reorganization Plan Number 4 of 1978, 43 Fed. Reg. 47, 713 (1978) and 29 C.F.R. § 2570.200a-2 (2005), the IRS has the responsibility for establishing the regulations with respect to the prohibition on the assignment or alienation of pension benefits. ERISA § 206(d); 29 U.S.C. § 1056(d) (2000). Those regulations are associated with the similar prohibition in I.R.C. § 401(a)(13)(B). Deference is given to authoritative and reasonable interpretations of law by the implementing agency. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

102. *Patterson v. Shumate*, 504 U.S. 753 (1992). A general provision of the Federal Bankruptcy Code did not supersede the Anti-Alienation Prohibition. Thus, a bankruptcy trust could not claim the pension benefits from a bankrupt participant. *Id.*

103. *Boggs*, 520 U.S. 833 at 851, 862 (1997). The Anti-Alienation Prohibition was held to preempt a spouse’s community property rights under state law. *Id.*

104. ERISA § 206(d)(1); 29 U.S.C. § 1056(d)(1) (2000).

First, pension benefits may not be involuntarily alienated with a few very narrow exceptions.¹⁰⁵ Thus, if an individual incurs a debt to another party, plan fiduciaries are prohibited from permitting the attachment or garnishment of the benefits on behalf of the creditor.¹⁰⁶ None of the benefits may be attached regardless of the amount of the participant's debt. The ability of creditors to obtain the distributed plan benefits indirectly, i.e., after their distribution is also severely curtailed as discussed, *infra*.

Second, pension benefits may not be voluntarily alienated.¹⁰⁷ Thus, pension plan fiduciaries are prohibited from complying with agreements by participants or beneficiaries to assign their plan benefits.¹⁰⁸ No part of the benefits may be assigned regardless of the amount of the consideration received by the participant in exchange for the assignment. Moreover, pension plan fiduciaries must disregard any explicit plan terms to the contrary, such as provisions setting forth a procedure for the voluntary assignment of pension benefits.¹⁰⁹ By contrast, health care plans, which are ERISA welfare plans, may decide whether to (1) include voluntary assignment provisions, such as those that permit health care providers to be paid directly by a health care plan, often under limited conditions, or (2) prohibit assignments.¹¹⁰

105. There are exceptions for (1) amounts a participant agrees or is ordered to pay to the plan because he has violated the ERISA fiduciary requirements, ERISA § 206(d)(4), 29 U.S.C. § 1056(d)(4) (2000); (2) the enforcement of tax levies pursuant to 26 U.S.C. § 6331 and judgments resulting from unpaid tax assessments, Treas. Reg. § 1.401(a)-13(b)(2); (3) the withholding of federal, state or local taxes from plan benefit payments, Treas. Reg. § 1.401(a)-13(c)(2)(ii); (4) the recovery by the plan of benefit overpayments, Treas. Reg. § 1.401(a)-13(c)(2)(iii), and (4) the recovery by the PBGC on behalf of the plan of certain non-annuity payments that were made prior to a plan termination Treas. Reg. § 1.401(a)-13(c)(2)(i).

106. *See generally* Treas. Reg. § 1.401(a)-13(b)(1) (2005).

107. This Article is focused on agreements and court orders that may be enforced against the plan and/or the participant or beneficiary. Thus, we will disregard the exception for voluntary but revocable assignments of up to 10 percent of a benefit payment. ERISA § 206(d)(2); 29 U.S.C. § 1056(d)(2) (2000).

108. ERISA § 404(a)(1)(D); 29 U.S.C. § 1104(a)(1)(D) (2000).

109. *Id.*

110. *See generally* *Physicians Multispecialty Group v. The Health Care Plan of Horton Homes, Inc.* 371 F.3d 1291 (11th Cir. 2004). The estate of a deceased patient assigned medical claims to a treating physician group. The issue was the patient's eligibility for defendant coverage. The court held that the group lacked standing because "an assignment is ineffectual if the plan contains an unambiguous anti-assignment provision." *Id.* at 1295. However, if there is no such provision, courts have generally permitted medical benefit claim assignments. *See, e.g.,* *HCA Health Services of Ga., Inc. v. Employers Health Ins. Co.*, 240 F.3d 982, 991 (11th Cir. 2001) (assignment to out-of-network provider permitted); *Misic v. Building Service Employees Health & Welfare Trust*, 789 F.2d 1374 (9th Cir. 1986) (permitting a dentist to pursue

Four major kinds of pension plans are not subject to the Anti-Alienation Prohibition: (a) top-hat plans, which are primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees;¹¹¹ (b) plans maintained solely to provide pension benefits for certain employees in excess of the contribution and benefit limits that the Internal Revenue Code (the "Code") imposes for tax qualification purposes;¹¹² (c) simplified employee pension plans and simple retirement account plans, which place assets for participants' benefits in individual retirement accounts,¹¹³ and (d) 401(k) plans to the extent they have designated that benefits may be deposited in Roth IRAs.¹¹⁴

B. ERISA Prohibits Creditors from Obtaining a Participant's Benefits Under a Pension Plan

The Supreme Court has decided two cases in which a participant's creditor sought to obtain the participant's benefits from an ERISA pension plan. Unlike the beneficiary disputes that are the focus of this Article, the claims were completely unrelated to the individual's plan interest and arose under federal laws. ERISA does not preempt other federal statutes. Rather, ERISA provides that none of its provisions "alter, amend, modify, invalidate or supersede" any other federal statute.¹¹⁵ Yet, in each case the Court unanimously decided that the Anti-Alienation Prohibition precluded the creditor's claim without discussing the relevance of the ERISA Plan Terms Benefit Mandate.

In 1990, the Supreme Court held in *Guidry v. Sheet Metal Workers National Pension Fund*¹¹⁶ that the Anti-Alienation Prohibition prevented a union from using a federal labor law to impose a constructive trust against an ERISA pension plan¹¹⁷ so that the plan would be prevented from paying benefits to an individual who had embezzled substantial funds from the union.¹¹⁸

unreimbursed claims assigned to him by his patients).

111. ERISA § 201(2); 29 U.S.C. § 1051(2) (2000); *see also* Boulet v. Flour Corp., No. H-05-0105, 2005 U.S. Dist. LEXIS 29973 (S.D. Tex. Oct. 31, 2005) (holding that survivor benefit requirements are not applicable to top-hat plans). *See generally* Holloman v. Mail-Well Corp., 443 F.3d 832 (11th Cir. 2006).

112. ERISA §§ 3(36), 201(7); 29 U.S.C. §§ 1002(36), 1051(7) (2000).

113. ERISA § 201(6); 29 U.S.C. § 1051(6) (2000); I.R.C. §§ 408(k), 408(p).

114. I.R.C. § 402A(b)(2).

115. ERISA § 514(d), 29 U.S.C. § 1144(d) (2000).

116. 493 U.S. 365 (1990).

117. The plan was a result of collective bargaining by the victimized union.

118. The Tenth Circuit, however, found that (1) the Anti-Alienation Prohibition did not apply to the pension plan benefits after their distribution, and (2) state law prohibited the union from obtaining those distributed benefits. *Guidry v. Sheet Metal Worker Local Unions*, 39 F.3d 1078 (10th Cir. 2000).

In 1992, a unanimous court held in *Patterson v. Shumate*,¹¹⁹ that the Anti-Alienation Prohibition prevented a participant's federal bankruptcy trustee from obtaining the participant's pension benefits.

In *Guidry*, the Supreme Court unanimously held that the Anti-Alienation Prohibition prevented the imposition of a constructive trust on a participant's undistributed plan benefits under which trust the pension plan benefits would be paid to the union from whom the participant embezzled funds. The Court found no meaningful distinction between such a trust and a prohibited garnishment of pension benefits.¹²⁰

The Court in *Guidry* also held that the specific ERISA prohibition, the Anti-Alienation Prohibition, superseded the general relief parts of the labor statute. The federal labor statute at issue in *Guidry* was Section 501(b) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 501, which provides that a union may "recover damages or secure an accounting or other appropriate relief" from an officer who has embezzled funds from the union. The court below had found that a permissible constructive trust had been established because (a) the embezzlement of the union funds injured the union members, who were also the plan participants, and thus the plan was injured, and (b) the "other appropriate relief" authorized for violations of the LMRDA overrode the ERISA prohibition on the assignment or alienation of pension benefits.¹²¹

The Supreme Court unanimously held that (a) the plan was distinct from the union; (b) an injury to the union was not equivalent to an injury to the plan; and thus (c) the plan would not be the beneficiary of the constructive trust. Thus, such a trust was impermissible because the specific Anti-Alienation Prohibition superseded the general relief provision of the LMRDA.¹²² The Court distinguished the kind of judgment that may be obtained under the LMRDA from the manner by which the judgment could be collected.¹²³ Moreover, eight of the justices¹²⁴ unequivocally declared:

119. 504 U.S. 753 (1992).

120. 493 U.S. 365, 372 (1990).

121. *Guidry*, 493 U.S. at 369-70.

122. *Id.* at 374-76. The Court noted that the priority between ERISA and the LMRDA was not resolved by either statute's savings clause for other federal statutes. 29 U.S.C. § 1144(d) (2000) and 29 U.S.C. § 523(a) (2000), respectively. *Id.* at 375.

123. *Id.* at 376. By contrast, in *Mackey*, which *Guidry* cited, only the dissenting opinion of four justices made such a distinction. *Mackey*, 486 U.S. at 833-35, 843-46.

124. *Id.* (emphasis added). Justice Thurgood Marshall did not join in this part of the opinion.

Nor do we think it appropriate to approve any generalized equitable exception—either for employee malfeasance or for criminal misconduct—to ERISA’s prohibition on the assignment or alienation of pension benefits. Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. *If exceptions to this policy are to be made, it is for Congress to undertake that task.*

As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text. The creation of such exceptions, in our view, would be especially problematic in the context of an anti-garnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. *A restriction on garnishment therefore can be defended only on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties.* It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the rule in particular circumstances would be “especially” inequitable. The impracticability of defining such a standard reinforces our conclusion that the identification of any exception should be left to Congress.¹²⁵

In *Shumate* the Supreme Court unanimously held that the Anti-Alienation Prohibition prevented pension benefits from being alienated under another federal law, the Federal Bankruptcy Code.¹²⁶ In particular, the Court held that the Anti-Alienation Prohibition, which must be part of the terms of an ERISA pension plan constituted “an enforceable transfer restriction” for purposes of the Bankruptcy Code § 541(c)(2)’s exclusion of property from the bankruptcy estate. The Court¹²⁷ described its unanimous decision as extending its holding in *Guidry*, as follows:

We previously have declined to recognize any exceptions to ERISA’s antialienation provision *outside* the bankruptcy context. *See Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365 (1990) (labor union may not impose constructive trust on pension benefits of union official who breached fiduciary duties and embezzled funds). Declining to recognize any exceptions to that provision *within* the bankruptcy context minimizes the possibility that

125. *Guidry*, 493 U.S. at 376-77 (emphasis added; citations omitted).

126. 504 U.S. 753 (1992).

127. At this time Justice Clarence Thomas had replaced Justice Thurgood Marshall on the court, and unlike his predecessor, Justice Thomas joined this part of the opinion which declined to recognize any exceptions to the Anti-Alienation Prohibition.

creditors will engage in strategic manipulation of the bankruptcy laws in order to gain access to otherwise inaccessible funds.¹²⁸

The Court then repeated the previously quoted language from *Guidry* about how ERISA § 206(d) reflects a considered congressional policy choice. Moreover, the Court took the opportunity to state:

Finally, our holding furthers another important policy underlying ERISA: uniform national treatment of pension benefits. See *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Construing “applicable nonbankruptcy law” to include federal law ensures that the security of a debtor’s pension benefits will be governed by ERISA, not left to the vagaries of state spendthrift trust law.¹²⁹

C. *The Supreme Court Allows Creditors to Garnish Participants’ Welfare Benefits Using a Questionable Interpretation of the ERISA Explicit Preemption*

In 1988 the Supreme Court in *Mackey v. Lanier Collection Agency*¹³⁰ considered the ability of an individual’s creditor to garnish¹³¹ the individual’s benefits from the ERISA vacation plan which was providing those benefits. The Supreme Court first unanimously agreed that ERISA preempted the following Georgia prohibition on the garnishment of funds:¹³²

Funds or benefits of a pension, retirement, or employee benefit plan or program subject to the provisions of the federal Employee Retirement Income Security Act of 1974, as amended, shall not be subject to the process of garnishment . . . unless such garnishment is based upon a judgment for alimony or for child support.¹³³

The Court cited the statement in its unanimous opinion, *Shaw v. Delta Airlines*,¹³⁴ that “[a] law ‘relates to’ an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.”¹³⁵ By referring directly to ERISA plans the state law related to ERISA and was thus preempted with respect to all ERISA plans.¹³⁶ The Court did not discuss whether the statute would be preempted if the words

128. *Id.* at 764.

129. *Id.* at 765.

130. 486 U.S. 825 (1988).

131. See BLACK’S LAW DICTIONARY 612 (5th ed. 1979) (defining garnishment as a statutory proceeding whereby a person’s property, money, or credits in possession or under control of or owing another are applied to payment of the person’s debt to a third person by proper statutory process against debtor and garnishee).

132. 486 U.S. 825, 828, n.2 (1988).

133. *Id.*

134. 463 U.S. 85, 96-97 (1983).

135. *Id.*

136. *Mackey*, 486 U.S. at 829-30.

“subject to the provisions of the federal Employee Retirement Income Security Act of 1974, as amended,” were omitted.¹³⁷ In such case, Conflict Preemption would appear to apply to the statute to the extent it applied to ERISA pension plans covered by the Anti-Alienation Prohibition. The ERISA Explicit Preemption would also appear to preempt such a statute with respect to all ERISA plans, even those that are not subject to the Anti-Alienation Prohibition, such as welfare plans,¹³⁸ because by determining which assignments of non-pension benefits are permissible it addresses an issue which ERISA addresses (and reaches different conclusions about) and thus relates to ERISA plans as discussed in the preemption section, *supra*.

The Court decided by a 5-4 vote that ERISA did not preempt the application to welfare plan participants of the general garnishment procedure of Georgia for “run-of-the-mill” state law claims, such as for unpaid rent, failure to pay creditors, tort damages by an ERISA plan, or the unspecified one before the court.¹³⁹ Unlike in the earlier unanimous part of the decision, the majority did not apply the *Shaw* analysis to the issue of whether garnishments of participant accounts had a connection with ERISA plans. Rather, the majority asserted that if a state law applying to plans is not preempted when applied to the plans it could not “relate to any [ERISA] employee benefit plan,” and thus was not subject to the Explicit ERISA Exemption. Thus, the ERISA Explicit Exemption could not prevent the application of the same law applying to participants and their plan accounts.¹⁴⁰ The majority then observed that ERISA permits state judgments against plans.¹⁴¹ The majority then concluded that ERISA must permit such judgments to be enforced by garnishment of plan assets in possession of a third party, such as an ERISA plan.¹⁴² Therefore, the majority asserted there was no basis for concluding that plan benefits are exempt from garnishments under the preemption statute.¹⁴³

137. In such case it would be similar but not identical to the Anti-Alienation Prohibition, which is limited to pension plans. The statutory exception for family support obligations would not apply to all QDROs which also may apply to property settlements associated with marital dissolutions. Moreover, QDROs are not treated as garnishments but benefit designations as discussed, *infra*.

138. See ERISA § 201(1); 29 U.S.C. § 1051(1). Thus, as discussed, *supra*, welfare plans may decide whether or not to accept assignments, and if so, the conditions under which assignments are accepted. See n.118 and accompanying text.

139. *Mackey*, 486 U.S. at 832-33.

140. *Id.* at 835-36.

141. *Id.* at 833-34.

142. *Id.* at 833-34.

143. *Mackey*, 486 U.S. at 836.

The four dissenting judges argued that Georgia's general garnishment procedure was preempted because otherwise ERISA plans could "face the repetitious and costly burden of monitoring controversies involving hundreds of beneficiaries and participants in various States" if garnishments were permitted.¹⁴⁴ The dissenters referenced the Court's unanimous decision in *Shaw*,¹⁴⁵ which had prevented New York from providing ERISA participants with pregnancy protections not available under ERISA or any other federal law because of the burden of having to administer an ERISA plan under various state mandates.¹⁴⁶ Thus, the *Shaw* decision emphasized how the administrative burdens of complying with a variety of garnishment procedures, and "relate to" employee benefit plans in the same manner as the preempted variety of disability benefits mandates. Therefore, the dissent asserted state garnishments must be similarly preempted.¹⁴⁷

The dissenters also asserted that under this administrative burden analysis garnishment of plan assets may remain permissible. A third party with the plan's property would bear the burden of garnishments relating to the plan's obligations.¹⁴⁸ By contrast, the ERISA plan would be the party bearing the burden of garnishments relating to the plan benefits of a participant or beneficiary, such as notifying the participant of the garnishment so the participant may challenge the garnishment. Thus, the ERISA goal of using preemption to prevent undue administrative plan burdens¹⁴⁹ would be achieved by applying preemption to garnishments against participant accounts but not to garnishments of plan assets.

Subsequent unanimous Supreme Court decisions favor the dissenting four justices.¹⁵⁰ The Court twice unanimously rejected

144. *Id.* at 842, 844.

145. 463 U.S. 85 (1983).

146. *Mackey*, 486 U.S. at 842-43. Reference was made to *Shaw v. Delta Airways* in which the Court unanimously used such an argument to justify the preemption of the New York State disability benefits mandate. *Id.* at 105, n.25.

147. *Id.* at 841-42.

148. *Id.*

149. *Egelhoff*, 532 U.S. at 148-49 (citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987)).

150. *But see N.Y. State Conference of Blue Cross & Blue Shield Plans*, 514 U.S. 645, 662 (1995). The Court's unanimous decision described *Mackey* as having disregarded the argument about the administrative burden state law garnishments would impose on ERISA plans, but did not clearly describe the impermissible burden the Court found in later decisions described *infra*. However, the administrative burden at issue with respect to the Explicit ERISA Preemption is not whether a specific state law is difficult to comply with but whether allowing different states to adopt different such laws would impose on employee benefit plans the administrative burden of complying with what could be numerous rules on a matter relating to the plan. For example,

the premise of the majority opinion when it distinguished between the kind of judgment that may be obtained with respect to plan participants and the manner by which the judgment may be collected under ERISA from such participants. Two years after *Mackey*, the Court permitted judgments against a pension plan participant but not their enforcement by means of a constructive trust against the participant's plan account.¹⁵¹ The Court more recently permitted overpayment judgments by a welfare plan against a participant but limited the manner in which it may be collected.¹⁵²

The majority also asserted that Congress knew how to exempt plan participants from garnishment, as it did for pension plan participants with the Anti-Alienation Prohibition, which applies only to pension plans.¹⁵³ However, the majority confused the Explicit ERISA Preemption with Conflict Preemption. The lack of conflict between the garnishment of welfare benefits and the Anti-Alienation Prohibition shows that Conflict Preemption is inapplicable. However, as discussed, *supra*, the Anti-Alienation Prohibition shows that limitations on the alienation of employee benefits, pension or welfare benefits, relate to employee benefit plans. Thus, the Explicit ERISA Exemption preempts such state laws.

The majority further asserted that interpreting the ERISA preemption statute to prohibit all garnishments,

would render § 206(d)(1) substantially redundant with § 514(a) as they [the participant] concede. As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.¹⁵⁴

The dissent responded that a "partial overlap" is not a superfluity but a necessary part of the Explicit ERISA Preemption.¹⁵⁵ Explicit ERISA standards are not rendered redundant by the Explicit ERISA Exemption, but help determine

a state law requiring that all pension benefits vest immediately would lessen the administrative burden on most plans which must otherwise comply with more complicated vesting schedules. Yet such a state law would be preempted because among other reasons, permitting states to impose different vesting schedules would impose a tremendous administrative burden on the sponsor of a pension plan. *Id.*

151. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990).

152. *Sereboff v. Mid-Atl. Med. Services*, 126 S. Ct. 1869 (2006); *accord* *Great-West Life v. Knudsen*, 534 U.S. 204 (2002).

153. *Mackey*, 486 U.S. at 836-37.

154. *Id.* at 837 (citations omitted).

155. *Id.* at 846-47. There was also an argument about the significance of REACT amendments to the ERISA Explicit Preemption which is discussed, *infra*.

the contours of the Exemption as discussed, *supra*. If a state law conflicts with a specific ERISA mandate, by definition it must relate to an ERISA plan and thus be preempted by both the ERISA Explicit Preemption and Conflict Preemption.¹⁵⁶

Neither the majority nor the dissent discussed the significance of the core ERISA mandate that ERISA fiduciaries follow plan terms (the ERISA Plan Terms Benefit Mandate)¹⁵⁷ which arguably requires plan fiduciaries to pay participants in accord with plan terms regardless of any attempted garnishment on ERISA participant accounts. A seven-justice majority of the Supreme Court in *Egelhoff*¹⁵⁸ later cited the ERISA Plan Terms Benefit Mandate and the distinct administrative burden argument when the Court used the Explicit ERISA Preemption to prevent claimants from relying on state law¹⁵⁹ to deprive designees of their survivor benefits from either a pension plan or a welfare plan. Thus, the *Egelhoff* majority also thereby disavowed the part of the *Mackey* decision that the Explicit ERISA Preemption does not apply to individual entitlements by participants and beneficiaries.

IV. ERISA STATUTORY PROTECTIONS FOR THE SPOUSES, FORMER SPOUSES, CHILDREN AND OTHER DEPENDENTS OF PARTICIPANTS

ERISA protects the spouses, former spouses, children and dependents of participants with two benefit designation mandates that further an important policy underlying ERISA: the uniform national treatment of ERISA plan benefits. The Retirement Equity Act ("REACT") enacted these mandates in 1984.¹⁶⁰ Congress designed REACT:

to improve the delivery of retirement benefits and provide for greater equity under private pension plans for workers and their spouses and dependents by taking into account changes in work patterns, the status of marriage as an economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home, and for other purposes.¹⁶¹

Before REACT, only one ERISA provision explicitly referred to the rights of spouses, former spouses, children and dependents of participants. ERISA § 205, 29 U.S.C. § 1055, which was part of ERISA as originally enacted in 1974 required those pension plans that provided annuity benefits to provide joint and survivor annuity benefits (with the spouse having survivor rights) as the

156. *Id.*

157. ERISA § 404(a)(1)(D); 29 U.S.C. § 1104(a)(1)(D) (2000).

158. 532 U.S. 141 (2001).

159. Unlike the *Mackey* claims, the issue in *Egelhoff* not only related to the plan interests of the participant and the beneficiary, but was who had a superior claim to those plan interests.

160. Pub. L. No. 98-397; 98 Stat. 1426 (1984).

161. *Id.* at 1426, Preface.

default annuity benefit at retirement and during the period for which early retirement is permitted.¹⁶² However, such protection was quite limited because a participant could deprive the spouse of those pre-REACT survivor benefits without his or her spouse's consent.¹⁶³ Furthermore, no pre-REACT provision required that spouses be entitled to any survivor benefits for plans that provided no annuity benefits. Thus, DC plans, such as many profit-sharing or money purchase pension plans, which provided only lump sum payments, were not required to provide spouses with any survivor benefits.

REACT enhanced the protection of spouses of participants during their marriage by strengthening and extending the coverage of the original pension beneficiary designation mandate of ERISA § 205, 29 U.S.C. § 1055. There were three enhancements: (1) more pension plans were covered, (2) covered pension plans were required to designate spouses as beneficiaries of specified survivor benefits, and (3) any change in such statutory designations requires the written consent of the participant's spouse. On the other hand, REACT provided that spouses in community property states would have no greater rights to survivor benefits during a marriage than spouses in other states. REACT reversed several court holdings, including one by which the Supreme Court apparently held that community property may provide spouses with interests in a participant's pension during the marriage prior to any marital dissolution, and thus arguably provided spouses with survivor benefits based on such interest.¹⁶⁴

162. This requirement was further curtailed by the IRS amendment to Treasury Regulation § 1.401(a)-11(b)(1) in response to *BBS Associates v. C.I.R.*, 74 T.C. 118 (1990), *aff'd*, 661 F.3d 913 (3d Cir. 1981). That amendment permitted plans whose normal retirement benefit was not an annuity but offered annuities, such as some DC plans whose normal retirement benefit was a lump sum, to refuse to make the joint and survivor benefit the normal default benefit.

163. *See, e.g.*, *Cobb v. Cent. States, Southwest and Southeast Pension Fund*, No. 05-30906, 2006 U.S. App. LEXIS 21476 (5th Cir. Aug. 22, 2006) (holding that there was no subject matter jurisdiction for spouse claiming pre-REACT survivor benefits); *Lerra v. Monsanto Co.*, 521 F. Supp. 1257, 1263 (spouse not entitled to pre-REACT survivor benefits when participant chose life annuity). *But see* *Sladek v. Bell Sys. Mgmt. Pension Plan*, 880 F.2d 972 (7th Cir. 1989) (allowing a spousal survivor benefit claim when based on allegation that participant suffered from Alzheimer's disease and lacked capacity to deprive her of pre-REACT spousal benefits).

164. *See Boggs v. Boggs*, 520 U.S. 833, 850 (1997) (finding no rights to community property in a participant's pension plan passed upon the death of the participant's spouse to the beneficiaries of the spouse's estate). Therein, the Supreme Court disavowed the apparent implications of its pre-REACT denial of an appeal based on want of a federal question. *In re Marriage of Campa*, 89 Cal. App. 3d 113, *cert. denied*, 444 U.S. 1028 (1980). Such denial had been interpreted to hold that pension claims based on community property do not conflict with the Anti-Alienation Prohibition or the ERISA

ERISA § 205, 29 U.S.C. § 1055, however, does not give a participant's spouse any protection after the dissolution of their marriage, which includes the entry of a separation order.¹⁶⁵

Prior to the enactment of REACT, no ERISA section explicitly referred to the interaction between ERISA and the domestic relations orders issued by state courts. Thus, Congress could not simply enhance an existing section as it had done for spousal survivor benefits. Congress instead modified the two sections that had been used to challenge such orders to clarify when such orders were to be followed and when to be disregarded. One of the Committee reports contains the following statement that was quoted by the Supreme Court majority in *Mackey*:¹⁶⁶

'The courts are divided on the question of whether [ERISA's] anti assignment clause applies to State domestic relations orders and also on the question of whether the pre-emption clause [§ 514(a)] refers to State domestic relations laws and court orders.'¹⁶⁷

The three Congressional reports that accompanied REACT,¹⁶⁸ however, describe little division because there was little division to report. Domestic relations orders relating to child support or alimony consistently survived attacks that they were preempted by ERISA or that they violated the ERISA Anti-Alienation Prohibition as described in *American Telephone and Telegraph v. Merry*.¹⁶⁹ The Supreme Court had suggested in an early preemption case that the order in *Merry* may have been a state law which was not preempted because it affected employee benefit plans in "too tenuous, remote and peripheral a manner."¹⁷⁰ After

Explicit Preemption because they are based on the claim that the spouse acquired an ownership interest in the pension upon its creation, rather than upon a subsequent transfer of the participant's interest. *See generally* Grant Summers, *Comment, ERISA Preemption of "Direct" and "Indirect" Community Property Interests in Pension Plans upon the Non-participant Spouse's Death*, 55 LA. L. REV. 409, 438-40 (Nov. 1994); Julie McDaniel Dallison, *Comment, Disappearing Interests: ERISA Impliedly Preempts the Predeceasing Nonemployee Spouse's Community Property Interest in the Employee's Retirement*, 49 BAYLOR L. REV. 477 (Spring 1997).

165. *See* Treas. Reg. § 1.401(a)-20 Q&A-27 (2005), discussed *infra*.

166. 486 U.S. 825, 838 (1988).

167. H.R. REP. NO. 98-655, pt. 1, p. 30 (1984).

168. H.R. REP. NO. 98-655, pt. 1 (1984); H.R. REP. 98-655, pt. 2 (1984); S. REP. NO. 98-575, 98th Cong. 2d. Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News at 2565. The first contains no citations of decisions upholding or rejecting any domestic relations orders.

169. 592 F.2d 118, 122-25 (2d Cir. 1979). The court summarized the case-law in the course of upholding an order requiring a pension plan to satisfy child support and alimony arrearage. *Id.* *But see*, *Gen. Motors Corp. v. Townsend* (E.D. Mich. 1976) (holding the Anti-Alienation Prohibition preempted an order based on community property rights to a pension plan). That case was cited by *Merry*, but not by any of the Committee reports.

170. *Shaw v. Delta Airlines*, 463 U.S. 85, 100, n.21 (1983).

referring to four cases upholding orders for family support obligations, including *Merry*, Congress included a footnoted reference in two of the Congressional reports to a divergence of opinion regarding whether ERISA preempts community property rights to pension benefits.¹⁷¹

There is a divergence of opinion among the courts as to whether ERISA preempts State community property laws insofar as they relate to the rights of a married couple to benefits under a pension, etc. plan.^{FN-24}

Footnote number twenty-four in both reports refers to the same two conflicting decisions. The first is a 1978 district court decision, *Francis v. United Technology*,¹⁷² described as holding that "ERISA's preemption provision prevents the application of State community property law permitting attachment of plan benefits for family support purposes." However, *Francis* never mentioned family support. Rather, it held that the Anti-Alienation Prohibition and the ERISA Explicit Preemption prevented a participant's spouse from using community property to obtain an interest in the participant's pension interest in the course of a marital dissolution.¹⁷³ The second decision, *Stone v. Stone*,¹⁷⁴ was issued two years later by the Ninth Circuit, which contains the *Francis* district court, and thus eliminated the conflict within that Circuit. The court stated:

As our decision in *Carpenters Pension Trust v. Kronschnabel*, 632 F.2d 745 (9th Cir. 1980), demonstrates, the Supreme Court's summary dismissal of the appeal in *In re Marriage of Campa* binds district and circuit courts to the view that ERISA does not preempt state-court orders requiring a pension plan to pay a community property share of a plan participant's monthly benefit payments directly to his or her ex-spouse.¹⁷⁵

Thus, there seemed to be little reason in 1984 to question whether state community property laws, or alimony or family

171. H.R. REP. NO. 98-655, pt. 2, p.18 (1984); S. REP. NO. 98-575, 98th Cong. 2d. Sess., reprinted in 1984 U.S.C.C.A.N. at 2565.

172. 458 F. Supp. 84 (N.D. Cal. 1978).

173. See also *Kerbow v. Kerbow*, 421 F. Supp. 1253 (N.D. Tex. 1976) (finding that the court lacked jurisdiction to consider spousal claim to participant's retirement benefits because marital dissolution order recognizing spousal community rights in pension did not result in the spouse being an ERISA participant or beneficiary). REACT resolved such issue by treating QDROs as beneficiary designations which gave claimants access to federal courts to enforce their benefit entitlements.

174. 633 F.2d 740 (9th Cir. 1980). The Report does not mention that the *Francis* federal district had reached the opposite conclusion in the same year that original decision was issued in *Stone v. Stone*, 450 F. Supp. 919 (N.D. Cal. 1978).

175. *Stone*, 633 F.2d at 742 (citations omitted).

support laws established enforceable rights to pension benefits.¹⁷⁶ There was, however, an issue about the extent, if any, by which those orders could provide rights to benefits that the participant had not yet requested. The discussion in both Congressional reports concludes¹⁷⁷ with a reference to an IRS ruling¹⁷⁸ that the anti-alienation prohibition in the qualification requirements will not be violated if a pension plan complies with an order to meet the participant's family support obligations when the participant is receiving benefits, but may be violated if the participant is not then receiving such pension benefits. The reports also observe that the IRS took no position about whether the anti-alienation prohibition would be violated if a state court requires pension payments when the participant is not receiving benefits.¹⁷⁹ On the other hand, the reports make no mention by the Seventh Circuit that there is no ERISA violation in such a state order if the participant could have elected, but did not elect, to begin receiving pension benefits.¹⁸⁰ Congress in REACT provided that under very limited conditions a state court may require a pension plan to pay benefits when the participant is not receiving benefits.¹⁸¹

Nevertheless, Congress did not simply add a third state law exclusion for domestic relations law (including community property law) from the ERISA Explicit Preemption in addition to

176. See Louis Everett Graham, *Kentucky Survey-Domestic Relations*, 73 KY. L. J. 379, 380-83 (1984) for a discussion of the pre-REACT law with respect to the applicability of the Anti-Alienation Prohibition to domestic relations orders.

177. H.R. REP. NO. 98-655, pt. 2, p.18 (1984); S. Rep. No. 98-575, 98th Cong. 2d. Sess., reprinted in 1984 U.S.C.C.A.N. at 2565; see also H.R. REP. NO. 98-655, pt. 1, p.30 (1984) (observing that the Department of Labor had taken a position similar to that of the IRS).

178. IRS Rev. Rul. 80-27, 1980-1 C.B. 85 (withdrawn as obsolete by Revenue Ruling 91-8, 1991-1 C.B. 281 because of the enactment of REACT).

179. *Id.* However, in the final sentence of the Ruling the IRS stated that benefits could not be so attached "since the participant has no present right to such benefits." *Id.*; see *Monsanto Co. v. Ford*, 534 F. Supp. 51 (E.D. Mo. 1981) (holding a distribution before the participant began to receive his pension benefits would violate the Anti-Alienation Prohibition and citing the IRS ruling). The court also explicitly expressed no objection to an agreement between the participant and his spouse to share the participant's benefit payments. *Id.*

180. *Savings and Profit-Sharing Fund of Sears Employees v. Gago*, 717 F.2d 1038, 1045 (7th Cir. 1983). The decision also referred to the question of whether a state court may order a pension plan to make benefits payments in violation of the plan terms, which appeared in the jurisdictional statement in *In re Marriage of Campa*, 444 U.S. 1028 (1980). This was one of the questions that the Supreme Court decided did not raise a substantial federal question when the Court refused to grant certiorari.

181. The QDRO Provisions permit QDROs to obtain benefits when the participant is not receiving benefits if the participant could obtain such benefits and is still working. ERISA § 206(d)(3)(E); 2 U.S.C. § 1056(d)(3)(E) (2000).

those for laws regulating insurance, banking or securities and for generally applicable criminal laws. Nor did it add a second exclusion from the Anti-Alienation Prohibition in addition to those for voluntary assignments. Nor did it even do so for laws pertaining to only to the orders for family support,¹⁸² these orders did not appear to be in dispute as described in the Committee Reports discussed earlier. Rather, it made far more substantial changes to ERISA.

First, a second ERISA beneficiary designation mandate was added, namely ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3).¹⁸³ This section requires pension plans to designate spouses, former spouses, children and dependents of participants as beneficiaries¹⁸⁴ pursuant to those state domestic relations orders which meet the QDRO standards.¹⁸⁵ Among these standards were the requirements that the orders be domestic relations orders,¹⁸⁶ which (a) clearly specified the plan, the beneficiaries, and the designated benefits,¹⁸⁷ (b) were consistent with the pension plan's terms,¹⁸⁸ and (c) did not increase the plan's actuarial costs.¹⁸⁹ However, QDROs may provide the following two benefits that may not otherwise be consistent with the plan's terms: (a) separate interests in certain circumstances, so that payments may be made even if the participant is not collecting pension benefits,¹⁹⁰ and (b) former spouses may be treated as spouses for purposes of spousal survivor benefits in certain circumstances.¹⁹¹ Unlike the designees of the other statutory designation for spousal survivor benefits, the designees of QDROs have no right to give up their entitlements to such benefits, other than the issue of a new QDRO which may only

182. See *Stone v. Stone & Seafarers Pension Plan*, 450 F. Supp. 919, 927-31 (N.D. Cal. 1978) (providing a good discussion of why making such a distinction is quite problematic). The court held that an ex-spouse could enforce a right to pension benefits against an ERISA plan where her right was based upon a marital dissolution order recognizing her community property interest in the pension. *Id.*

183. ERISA § 206(d)(3)(A); 29 U.S.C. § 1056(d)(3)(A) (2000).

184. ERISA § 206(d)(3)(J); 29 U.S.C. § 1056(d)(3)(J) (2000). This beneficiary status provides the spouses, former spouses, children and dependents of participants with standing to claim their plan benefits directly from the plan under (a) ERISA 502(a)(1)(B); 29 U.S.C. § 1132(a)(1)(B) (2000) for a non-terminated plan; (b); ERISA § 4070(a), 29 U.S.C. § 1370(a) for a terminated single-employer plan, or (c) ERISA § 4301(a), 29 U.S.C. § 1451 (a) for a terminated multi-employer plan.

185. The specifications for such orders are set forth in ERISA § 206(d)(3)(B); 29 U.S.C. § 1056(d)(3)(B) (2000).

186. ERISA § 206(d)(3)(B)(i); 29 U.S.C. § 1056(d)(3)(B)(i) (2000).

187. ERISA § 206(d)(3)(C); 29 U.S.C. § 1056(d)(3)(C) (2000).

188. ERISA § 206(d)(3)(D)(i); 29 U.S.C. § 1056(d)(3)(D)(i) (2000).

189. ERISA § 206(d)(3)(D)(ii); 29 U.S.C. § 1056(d)(3)(D)(ii) (2000).

190. ERISA § 206(d)(3)(E); 29 U.S.C. § 1056(d)(3)(E) (2000).

191. ERISA § 206(d)(3)(F); 29 U.S.C. § 1056(d)(3)(F) (2000).

be effective prospectively.¹⁹²

Second, REACT furthered the uniform national treatment of ERISA plan benefits by specifying that the only domestic relations orders that ERISA plans were required and permitted to follow were QDROs. Thus, any DRO that is not a QDRO is preempted by Conflict Preemption using the Anti-Assignment Prohibition.¹⁹³

REACT also added an explicit exclusion of QDROs from the ERISA Explicit Preemption.¹⁹⁴ The ERISA Explicit Preemption is thus not needed to preempt such domestic relations orders because their violation of the Anti-Alienation Prohibition causes them to be preempted by Conflict Preemption.¹⁹⁵ Nor is the QDRO exclusion needed to protect QDROs from preemption. ERISA requires that pension plans provide that QDROs are beneficiary designations.¹⁹⁶ Thus, the QDRO exclusion from the ERISA Explicit Exemption appears to have only one purpose: to emphasize that state court orders that purport to assign or create rights to non-pension benefits (welfare benefits, such as garnishment orders or domestic relations orders pertaining to life insurance benefits) are

192. ERISA § 206(d)(3)(D)(iii); 29 U.S.C. § 1056(d)(3)(D)(iii) (2000). There is one exception. A former spouse may become entitled under such order to the spousal survivor benefits set forth in ERISA § 205; 29 U.S.C. § 1055 (2000). In such a case, the participant may change such benefit with the consent of the former spouse as discussed, *supra*.

193. ERISA § 206(d)(3)(A); 29 U.S.C. § 1056(d)(3)(A) (2000).

194. ERISA § 514(b)(7); 29 U.S.C. § 1144(b)(7) (2000). There seems little significance in the fact that the preemption section unlike the anti-assignment prohibition section only mentions the QDRO exclusion, but not the treatment of other domestic relations orders. The initial inclusion is so broad that there is little reason to doubt its breadth. The anti-alienation provisions contain the substantive terms of the statutory beneficiary designation, so it was a more natural place than the preemption section to state that a domestic relations order that is not a QDRO is ineffective with respect to pension benefit designation. Such treatment is also consistent with the Supreme Court jurisprudence. The fundamental Supreme Court preemption cases, such as *Alessi v. Raybestos-Manhattan*, 451 U.S. 504 (1981) and *Shaw v. Delta Airways*, 463 U.S. 85 (1983), which described the broad reach of the preemption section, preceded the enactment of REACT. As a result, there seemed little need to be explicit about the broad reach of the Explicit ERISA Preemption. By contrast, the fundamental Supreme Court Anti-Alienation cases describing the broad reach of the Anti-Alienation Prohibition, such as *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990) and *Patterson v. Shumate*, 504 U.S. 753 (1992), followed the enactment of REACT, so there may have seemed to be more need to be explicit about the reach of the Anti-Alienation Prohibition. Thus, the REACT Congress may have had less confidence that the Court would accept the breadth of Anti-Alienation prohibition in ERISA § 206(d)(1); 29 U.S.C. § 1056(d)(1) (2000).

195. The Anti-Alienation Prohibition provides that domestic relations orders determining pension benefit entitlements that are not QDROs are void to such extent. ERISA § 206(d)(3)(A); 29 U.S.C. § 1056(d)(3)(A) (2000).

196. *Id.*

preempted contrary to *Mackey v. Lanier Collection Agency*.¹⁹⁷

Congress recognized that the new REACT rules preempted domestic relations orders that were previously treated as effective.¹⁹⁸ Thus, REACT contained two grandfather provisions. First, those domestic relations orders which did not meet the QDRO requirements, but that had been accepted by pension plans prior to the effective date of REACT, remained valid. Second, pension plans could choose to honor domestic relations orders obtained before the effective date of REACT, which did not meet the QDRO requirements.¹⁹⁹

REACT, as the presence of the term retirement in its title and preface suggests, focused primarily on pension benefits. Survivor entitlements under welfare plans, such as life insurance plans, are affected only by the addition of a QDRO exemption to the general preemption section, which as discussed, clarifies that domestic relations orders may not affect such welfare plan rights.²⁰⁰ It is irrelevant whether the claimants to such benefits are spouses, former spouses, children or other dependents of participants. However, subsequent legislation, protected the rights of children to health care benefits under specified domestic relations orders (called qualified medical care support orders ("QMSCOs"), but provided no similar protection for former spouses.²⁰¹ In particular, a state court order may not entitle a former spouse of a participant to any medical benefits from a participant's ERISA medical care benefit plan. While such benefits are not generally survivor benefits, the additional specific preemption exclusion further confirms that the QDRO preemption exclusion implies that state orders attempting to determine entitlements to ERISA benefits that are neither QDROs nor QMSCOs are preempted.

By contrast, Congress took a simpler approach with respect to the rights of former spouses to other federally regulated pension plans that had anti-alienation provisions after the Supreme Court held that federal law preempted domestic relations orders based on community property rights for such benefits. The Supreme

197. 486 U.S. 825 (1988). This preemption argument was made by the four dissenting justices, but rejected by the majority. *Compare id.* at 842-43 with *id.* at 839-40.

198. However, the majority in *Mackey* asserted, in dicta, that Congress may have intended to confirm that ERISA preempted no domestic relations orders. *Id.* at 839.

199. Section 303(d), Pub. L. No. 98-397, 98 Stat. 1426, 1453 (1984).

200. *Id.*

201. *See* ERISA § 609; 29 U.S.C. § 1169 (2000), (permitting a participant's children to obtain beneficiary rights under ERISA health care plans pursuant to child support orders, which meet certain specifications and are called qualified medical child support orders). Pub. L. 103-66, 107 Stat. 371 (1993) added this post-REACT section to ERISA.

Court held in 1981²⁰² that a spouse could not use a domestic relations order based on community property rights to obtain military pension benefits directly from the plan or indirectly from the participant.²⁰³ In 1982, prior to its enactment of REACT, Congress provided that military retirement pay may be divided when fixing the property rights or family support obligations between the parties to a divorce, dissolution, annulment or legal separation.²⁰⁴ Congress took a similar approach with respect to pension benefits under the Railroad Retirement Act after the Supreme Court held in 1979²⁰⁵ that a spouse could not use a domestic relations order based on community property rights to obtain such retirement benefits directly from such plan or indirectly from the participant.²⁰⁶ Congress provided for payments by the Railway Retirement Board of a portion of a participant's pension in accord with "a court decree of divorce, annulment, or legal separation or the terms of any court-approved property settlement incident to any such court decree."²⁰⁷ By contrast, there are court-approved property settlements and retirement benefit divisions that do not qualify as QDROs.

V. ERISA PENSION SURVIVOR BENEFICIARY DESIGNATIONS FOR SPOUSES

ERISA § 205, 29 U.S.C. § 1055, (the "Spousal Survivor Provisions") requires pension benefit plans to provide spouses with specified survivor benefits. Thus, such benefits and benefit designations must be part of all covered ERISA pension plans. No survivor benefits need be provided if the participant (a) has no spouse,²⁰⁸ (b) has been married to the spouse for less than a year,²⁰⁹

202. *McCarthy v. McCarthy*, 453 U.S. 210 (1981).

203. Prior to the legislation, 10 U.S.C. § 3929, entitled the soldier and only the soldier to retirement benefits, although 10 U.S.C. § 1434 permits the soldier to choose whether to receive a smaller life annuity so that survivor benefits may be paid to either his children or surviving spouse. Moreover, no alienation or anticipation of the retirement benefits is permitted other than for specified exclusions, one of which pertained to child support and alimony but excluded payments based on community property. Pub. L. 95-30, § 501 (d), 91 Stat. 159, 42 U.S.C. § 662 (c) (1976 ed., Supp. IV).

204. Uniformed Services Former Spouses' Protection Act, Pub. L. 97-252, 96 Stat. 718, 730-31 (1982) which added 10 U.S.C. § 1408.

205. *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).

206. Prior to the legislation, 45 U.S.C. § 231m(a), prevented any alienation or anticipation of the retirement benefits other than specified exclusions, one of which pertained to child support and alimony and explicitly excluded payments pertaining to community property.

207. Pub. L. 98-76, tit. IV, § 419(a)(3), 97 Stat. 938 (1983).

208. ERISA § 205(c)(2)(B); 29 U.S.C. § 1055(c)(2)(B) (2000). There may be a question whether a participant is married, such as where a common law marriage is claimed. *See, e.g., Blessing v. Deere Pension Plan*, 985 F. Supp. 899 (S.D. Iowa 1997).

(c) is separated from or has been abandoned by his or her spouse,²¹⁰ or (d) cannot locate his or her spouse.²¹¹ Thus, if a participant does not designate a spouse as the beneficiary of the participant's survivor benefits but shows that one of the exceptions set forth above is applicable, the plan must respect the participant's designation.²¹² There may also be a question of who is the participant's surviving spouse and is thus entitled to the surviving spouse benefits.²¹³

Welfare plans, such as life insurance plans or disability plans, are not subject to this requirement.²¹⁴ Four major kinds of pension plans need not provide spouses with survivor benefits: (a) top-hat plans, which are primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees,²¹⁵ (b) plans maintained solely to provide pension benefits for certain employees in excess of the contribution and benefit limits that the Code imposes for tax qualification

209. ERISA § 205 (f); 29 U.S.C. § 1055(f) permits, but does not require plans to limit the spousal survivor rights to spouses who have been married at least a year and describes the computation of the one-year period.

210. Pursuant to ERISA § 205(c)(2)(B); 29 U.S.C. § 1055(c)(2)(B) (2000), the Treasury has set forth in regulations additional circumstances under which spousal survivor benefits need not be provided. Those circumstances include either a separation or abandonment. However, in both those cases a court order is required to terminate the spouse's survivor rights. Treas. Reg. § 1.401(a)-20 Q&A-27 (2005); *see also* Bd. of Trustees of the Equity-League Pension Trust Fund v. Royce, 238 F.3d 177 (2d Cir. 2001) (providing that spousal survivor rights are not terminated by a marital separation but only by an order confirming the separation); Mendez v. TIAA/CREF, 982 F.2d 783 (2d Cir. 1992) (holding that spousal survivor rights are not terminated by an abandonment but only by an order confirming the abandonment).

211. ERISA § 205(c)(2)(B); 29 U.S.C. § 1055(c)(2)(B) (2000). This is an explicit statutory exception. It contains no reference to a court order confirming the participant's inability to locate the participant's spouse. By contrast, the abandonment exception set forth in the regulations requires such an order, *supra*.

212. Treas. Reg. § 1.401(a)-20 Q&A-27 (2005).

213. *See, e.g.*, DaimlerChrysler Benefits Plans v. Durden, 448 F.3d 918 (6th Cir. 2006) in which the court had to decide whether a participant's spouse, was the "wife" who left him at the latest in 1982 after bearing two children, or the "wife" whom he married in 1985 and with whom he also had two children and was living in 2003 when he died. The Court used common law principles of conflict of laws to choose Ohio law, which favored the first spouse, rather than Michigan law, which was specified in the plan and favored the second spouse. The majority and the dissent differed about the applicability of the ERISA policy of uniformity. The Plan Terms Benefit Mandate that plan benefits are determined by plan terms was not discussed by either the majority or the dissent. However, the dissent made a similar argument that the court should adhere to the terms "negotiated by the parties" that constituted the ERISA benefits contract, *i.e.*, the pension plan. The relevant plan term would have appeared to be the Michigan choice of laws provision, which the court rejected.

214. ERISA § 201(1); 29 U.S.C. § 1051(1) (2000).

215. ERISA § 201(2); 29 U.S.C. § 1051(2) (2000); *see also* n.119.

purposes,²¹⁶ (c) simplified employee pension plans and simple retirement account plans, which place assets for participants' benefits in individual retirement accounts,²¹⁷ and (d) 401(k) plans to the extent they have designated that benefits may be deposited in Roth IRAs.²¹⁸

The Spousal Survivor Provisions require pension plans that are DB Plans and not otherwise exempt to provide spouses with survivor benefits both at and before retirement. DB plans must designate the participant's spouse as the beneficiary of a qualified joint and survivor benefit ("QJSA")²¹⁹ payable beginning at the participant's retirement. A QJSA is a joint and survivor annuity for which the spouse is entitled to a survivor portion that is between fifty percent and one-hundred percent of the amount payable during the joint lives of the participant and the participant's spouse.²²⁰ DB plans must also designate the participant's spouse as the beneficiary of a qualified pre-retirement survivor benefit ("QPSA").²²¹ A QPSA for a DB plan is payable to the spouse if the participant does not survive until the date he or she has requested that the payment of plan benefits begin.²²² A QPSA is paid as an annuity to the spouse in an amount which is at least equal to the amount the spouse would have received under the plan's QJSA if the participant (a) had separated from service at the date of his death, and (b) survived until his earliest retirement age.²²³ However, if the present value of the QPSA is less than \$5,000, the amount may be but need not be distributed as a lump sum without the consent of the surviving spouse.²²⁴

The retirement and pre-retirement benefit designation rules for survivor benefits for spouses also apply to those DC plans (a) which are subject to the minimum funding rules, such as money

216. ERISA §§ 3(36) and 201(7); 29 U.S.C. §§ 1002(36), 1051(7) (2000).

217. ERISA § 201(6); 29 U.S.C. § 1051(6)(2000); I.R.C. §§ 408(k), 408(p).

218. I.R.C. § 402A(b)(2).

219. ERISA § 205(a)(1); 29 U.S.C. § 1055(a)(1) (2000).

220. ERISA § 205(d); 29 U.S.C. § 1055(d) (2000). Under Section 1040 of PPA of 2006, effective for plan years beginning after December 31, 2007, plans subject to these rules must also offer a qualified optional survivor annuity, which provides a survivor annuity of seventy-five percent of the joint annuity if the QJSA provides a survivor annuity less than seventy-five percent of the joint annuity and a survivor annuity of fifty percent of the joint and survivor annuity otherwise.

221. ERISA § 205(a)(2); 29 U.S.C. § 1055(a)(2) (2000).

222. If the participant dies before making such a request, the spouse also becomes entitled to a QPSA on the participant's death if the participant had any non-forfeitable benefits at the time of his death.

223. ERISA § 205(e)(1); 29 U.S.C. § 1055(e)(1) (2000).

224. ERISA § 205(g)(1); 29 U.S.C. § 1055(g)(1) (2000). Lump sum payments of the actuarial equivalent value of QJSAs otherwise require the consent of the surviving spouse and the participant, if living at such time.

purchase pension plans, but not profit-sharing plans or 401(k) plans,²²⁵ (b) to the extent the plan has been the recipient of benefits from a money purchase pension plan or a DB plan,²²⁶ or (c) to the extent the participant chooses to receive his or her benefit in the form of an annuity.²²⁷ The QPSA is generally paid by default as an annuity to the spouse that has an actuarial equivalent at least equal to fifty percent of the account balance of the participant as of the date of death,²²⁸ although many spouses often choose a lump sum payment.²²⁹ Thus, many such DC plans permit participants to choose a non-spouse as the recipient of the fifty percent of the account balance to which the spouse has no statutory entitlement.

The Spousal Survivor Provisions require DC plans not subject to the QJSA and QPSA rules, described in the prior paragraph, such as many profit-sharing plans and 401(k) plans, to provide the spouse with limited survivor benefits. The spouse must be designated as the beneficiary for the participant's account balance if the participant dies before starting to receive his or her pension benefits.²³⁰ However, spouses need not be provided with any retirement benefits. Moreover, for these DC plans, the participant may withdraw or borrow²³¹ all or part of his or her benefits without the consent of his or her spouse.

A. *Any Change in the ERISA Marital Survivor Beneficiary Designation Requires Spousal Consent*

ERISA permits a participant to change the pension plan default designation of his or her spouse as the beneficiary of the plan's survivor benefits (the "ERISA Marital Survivor Beneficiary Designation").²³² The participant's designation of a different beneficiary and/or different form of payment, however, may only become effective if the spouse consents in writing to such designation, which designation is described as a waiver by the participant.²³³ The spouse's consent is distinct from the

225. ERISA § 206(b)(1)(B); 29 U.S.C. § 1056(b)(1)(B) (2000).

226. ERISA § 206(b)(1)(C)(iii); 29 U.S.C. § 1056(b)(1)(C)(iii) (2000).

227. ERISA § 206(b)(1)(C)(ii); 29 U.S.C. § 1056(b)(1)(C)(ii) (2000).

228. ERISA § 205(e)(2); 29 U.S.C. § 1055(e)(2) (2000).

229. See David A. Pratt, *The Future of Employee Benefits*, 35 J. MARSHALL L. REV. 565, 608 (2002) (arguing that it appears that one to three percent of participants choose annuities, but the author does not mention whether beneficiaries make similar choices).

230. ERISA § 205(b)(1)(C)(I); 29 U.S.C. § 1055(b)(1)(C)(I) (2000).

231. By contrast, decisions to withdraw or borrow against plan benefits that are subject to the survivor annuity rules are subject to the same consent requirement by spouses as a decision to waive survivor benefits, ERISA § 205(c)(4); 29 U.S.C. § 1055(c)(4). Otherwise, the participant could deprive the spouse of the survivor benefits in the same manner had waived such benefits. See, e.g., Treas. Reg. § 1.401(a)-20, Q&A-24 (2005).

232. ERISA § 205(c); 29 U.S.C. § 1055(c) (2000).

233. ERISA § 205(c)(2); 29 U.S.C. § 1055(c)(2) (2000).

participant's designation, and thus does not change the statutory designation in of itself.²³⁴ The consent may either limit the participant's choices of beneficiaries and payments or permit the participant to choose any beneficiary and/or form of payment (such as a general consent).²³⁵ However, a spouse must acknowledge in a general consent that he or she may limit his or her consent to a specific beneficiary and a specific form of payment (where applicable) and that the spouse elects to relinquish both of these rights.²³⁶ More generally the spouse must "acknowledge the effect of the consent."²³⁷ The acknowledgment of the consent must be witnessed by a plan representative or a notary public.²³⁸ The latter requirement may be expected to insure that the spouse executed the waiver without obvious coercion, although it does not show that the spouse understands the consent or received any information about the benefit options.

There is no explicit requirement that the spouse receive any specific information about her or his rights at any time before or after the execution of the consent to give up his or her survivor benefits.²³⁹ By contrast, ERISA requires the plan to give the

234. See also *Egelhoff*, 532 U.S. 141 (2001) (holding that divorce does not terminate an explicit spousal survivor benefit designation of the former spouse even though following a divorce the participant does not need the former spouse's consent to change the beneficiary); *Hurwitz v. Sher*, 982 F.2d 778, 781 (2d Cir. 1992) (holding that a spouse may not be ordered to comply with prenuptial and waive pension interest after death of participant); *Nat'l Auto. Dealers and Associates Ret. Trust v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996) (finding that a prenuptial agreement does not establish a constructive trust in the survivor benefits paid to the participant's widow by a pension plan). *But cf.* *GreenbaumDoll & McDonald PLLC v. Sandler*, No. 3:05CV-754-H, 2006 U.S. Dist. LEXIS 78236 (W.D. Ky. Oct. 24, 2006) (rejecting a challenge to a surviving spouse's survivor benefits under Section 205, but in dicta pointing to the lack of a claim that the spouse breached a pre-nuptial agreement to execute a plan consent to a new beneficiary designation); *Callahan v. Hutsell, Callahan & Buchino P.S.C Revised Profit Sharing Plan*, 1993 U.S. App. LEXIS 34005 (6th Cir.) (remanding to determine if spouse breached a pre-nuptial agreement to execute a plan consent to a new beneficiary designation). Neither court simply declared that if the participant did not execute a new beneficiary designation the existence of consent was irrelevant because consents are not beneficiary designations.

235. ERISA § 205(c)(2)(A); 29 U.S.C. § 1055(c)(2)(A) (2000).

236. Treas. Reg. § 1.401 (a)-20, Q&A-31 (c) (2005).

237. ERISA § 205(c)(2)(iii); 29 U.S.C. § 1055(c)(2)(iii) (2000).

238. *Id.*; see also *Alfieri v. Guild Times Pension Plan*, No. CV 03-5717, 2006 U.S. Dist. LEXIS 54228 (E.D.N.Y. Aug. 3, 2006) (noting that a consent which was signed but not acknowledged by the spouse before a notary public was held to be ineffective); *Lasche v. Lasche Basic Profit-Sharing Plan*, 111 F.3d 863 (11th Cir. 1997) (finding a consent which lacked the signature of a notary or a plan witness in the space for a witness was not effective even though the plan administrator signed the form in a different place in his capacity as plan administrator).

239. *But see* *Neidich v. Estate of Neidich*, 222 F. Supp. 2d 357 (S.D.N.Y.

participant during a specified period of time a written and extensive explanation of the financial implications of the available benefit options,²⁴⁰ including providing the spouse with no survivor benefits.²⁴¹ However, pursuant to Congressional instructions,²⁴² the Internal Revenue Service ("IRS") has provided sample language for "spousal consents that meet the statutory requirements," which suggests that there is an implicit spousal disclosure obligation.²⁴³ The sample language is more understandable than the explanation required for notice to the participant who may elect a benefit option with the consent of the spouse.²⁴⁴ The IRS may be expected to modify such sample language to take into account the qualified optional survivor annuity introduced by the PPA of 2006.²⁴⁵ Because neither the sample spousal language nor its content is mandatory, the spouse may not be provided with the tools to understand the implications of consenting to give up his or her survivor interest.²⁴⁶

2002) (denying summary judgment to plan when spouse claimed the participant-fiduciary had concealed facts about the consent and exercised undue influence). Providing disclosure only to the participant may be a vestige of the pre-REACT ERISA § 205, 29 U.S.C. § 1055. Under that provision, the participant did not require spousal consent to elect to waive the spousal survivor benefit, and thus, there was little need to provide the spouse with any information about plan benefit options. *Id.*

240. Treas. Reg. § 1.417(a)(3)-1 (2005). The requirement for such explanation of the financial impact of different options is similar to the disclosure required for all pension plan participants who have distribution options. ERISA § 203(e); 29 U.S.C. § 1053(e); I.R.C. § 411(a)(11); Treas. Reg. § 1.411(a)-11 (2005). Plans are also not required to provide similar notices to beneficiaries who have several distribution options, such as a lump sum versus a life annuity. Treas. Reg. § 1.411(a)-11(c)(5) (2005).

241. ERISA § 205(c)(3); 29 U.S.C. § 1055(c)(3) (2000), I.R.C. § 417 and Treas. Reg. § 1.417(a)(3)-1 (2005); *see also* Vilas v. Lyons, 702 F. Supp. 555 (D. Md. 1988) (noting that the law only required that an explanation be provided to the participant; the court nevertheless reviewed and found that the disclosure of the plan benefit options on the consent form was adequate).

242. Section 1457 of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1775 (1996).

243. I.R.S. Notice 97-10, 1997-1 CB 370.

244. *Id.*; Treas. Reg. § 1.417(a)(3)-1 (2005).

245. Section 1004 of PPA of 2006 provides that such benefits must be made available for plan years beginning after December 31, 2007.

246. *See, e.g., In re Estate of Hopkins*, 574 N.E.2d 230 (1991) (holding that a general release in a prenuptial agreement was a consent that satisfied the terms of ERISA § 205(c)(2)(A); 29 U.S.C. § 1055(c)(2)(A) (2000)). The court found it irrelevant that the individual could not have understood the survivor rights she was giving up because those rights were not created until REACT was enacted after the execution of the agreement. *Id.* Understanding the implications of the consent would, however, appear to be a basic requirement for a valid release of a person's claim to an entitlement to ERISA plan benefits. *See* Albert Feuer, *When Are Releases of Claims for ERISA Plan Benefits Effective?* 38 J. MARSHALL L. REV. 773, 796-802, 807-808 (Spring 2005) (providing a discussion of fiduciary releases and general releases).

An effective consent to the participant's waiver of spousal benefits may not be part of a prenuptial agreement, but must be executed while the spouse in question is married to the participant.²⁴⁷ The QDRO provisions that may give former spouses rights to a participant's pension benefits contain no-spousal-consent or waiver provisions because ERISA does not give spouses any pension rights during or after a marital dissolution or separation, when ERISA no longer requires that plans provide them with survivor benefits.²⁴⁸ Thus, there are no ERISA consent provisions applicable to prenuptial waivers of claims to a participant's pension benefits in such a dissolution or separation (when the entitlement to spousal survivor benefits terminates); state law determines the effectiveness of such spousal waiver.²⁴⁹

If the spouse ceases being a spouse, whether by reason of death or marital dissolution,²⁵⁰ and there is no contrary QDRO which establishes a new statutory benefit designation, as

247. Treas. Reg. § 1.401(a)-20 Q & A-28 (2005); *see also* Hagwood v. Bellsouth Savings Plan, 282 F.3d 285 (4th Cir. 2002) (holding that Section 205 consents must be executed while the individual is a spouse); Nat'l Auto. Dealers and Assoc. Ret. Trust v. Arbeitman, 89 F.3d 496, 501 (8th Cir. 1996) (holding that pre-nuptial waivers do not affect widow's rights and spouse may not be ordered to waive or treated as holding property in constructive trust for others); *accord* Hurwitz v. Sher, 982 F.2d 778, 781 (2d Cir. 1992). *But see In re Estate of Hopkins*, 574 N.E.2d 230 (1991) (finding that a widow waived survivor rights in prenuptial agreement-Treasury Regulation dismissed as being interpretative and thus deserving little respect without any consideration of the deference required to be given to interpretative regulations by *Chevron USA v. Nat. Resources Def. Council*, 467 U.S. 837 (1984)).

248. *Edmonds v. Edmonds*, 710 N.Y.S.2d 765, 768-69 (2000). In that case, a woman was defending her pension benefits against a claim by her ex-husband.

249. *See, e.g., Savage-Keough v. Keough*, 861 A.2d 131, 373 (2004); *Sabad v. Sabad*, 825 A.2d 682 (2003); *Critchell v. Critchell*, 746 A.2d 282, (2000); *Stewart v. Stewart*, 541 S.E.2d 209, (2000); *In re the Marriage of DiFatta*, 306 714 N.E.2d 1092 (1999); *Moor-Jankowski v. Moor-Jankowski*, 222 A.2d 422, (1995); *In re the Marriage of Rahn*, 914 P.2d 463 (1995). However, a contrary decision was reached in *Richards v. Richards*, 640 N.Y.S.2d 709 (1995), *aff'd*, 232 A 2d 303, 648 (1996) in which a court found that ERISA preempted a prenuptial agreement which included a waiver for any claim to participant's "present or future" pension rights and the future spouse had agreed to execute a consent to spousal rights. The participant sought an order compelling the spouse to execute a consent to a waiver for any claim to participant's "present or future" pension rights and the future spouse had agreed to execute a consent to spousal rights. The participant sought an order compelling the spouse to execute a consent to a waiver of her spousal survivor benefits during the divorce action, and almost no attention was directed to the applicability of the waiver to the marital dissolution and there was no mention of any of those decisions. Moreover, unlike the other decisions, the agreement did not explicitly mention a waiver of pension rights upon the dissolution of the marriage.

250. A marital separation is treated as a marital dissolution as discussed, *supra*.

discussed within this Article, the participant may but need not disregard any limitations in the spouse's consent.²⁵¹ The Supreme Court has ruled that ERISA does not cause any explicit designation of a spouse to be cancelled upon the dissolution of a marriage between such spouse and the participant.²⁵² However, it would appear that any implicit statutory designation of a spouse as the beneficiary of the participant's survivor benefits vanishes on the dissolution of their marriage.²⁵³

B. ERISA Plan Liabilities and Spousal Entitlements Associated with ERISA Marital Survivor Beneficiary Designations

The Spousal Survivor Provisions permit a plan to be discharged of its obligation "to the extent of its payments" if its fiduciaries acted "in accordance with part of this subtitle [the fiduciary responsibility sections of ERISA] in relying" on the consent described above or in making the determination that the participant has no spouse or cannot locate his or her spouse.²⁵⁴ In such circumstances a plan will not be required to pay plan benefits twice or to seek restitution from the wrongful recipient. A similar relief provision pertains to the other statutory beneficiary designation, QDROs, discussed *infra*.²⁵⁵ These relief provisions are unique to statutory beneficiary designations. If a plan otherwise pays the benefits of a participant or a beneficiary to a person not entitled to plan benefits, ERISA makes no provision for plan relief from a double benefit payment obligation, regardless of whether

251. Treas. Reg. § 1.401(a)-20 Q& A-25(b) (2005). The courts have rejected the claim that if the participant slays his or her spouse, the spouse's estate retains the spousal survivor benefits when the participant designated non-spousal beneficiaries without the consent of the slain spouse. *Caterpillar v. Estate of Velton Lacefield-Cole*, 2007 U.S. LEXIS 71931 (N.D. Ill.); *Woolbert v. Kimble Glass, Inc.*, 54 F. Supp. 2d 539 (W.D.N.C. 1999). In both cases, the participant killed himself after slaying his spouse, and the courts refused to apply the slayer principles which prevent an individual from benefitting from a slaying. The slayer principles, however, are not part of ERISA and thus not applicable to such plans, as discussed, *infra*.

252. *Egelhoff*, 532 U.S. 141 (2001).

253. Such an issue would arise if a participant makes a beneficiary designation before marrying a person other than the designee, but does not change the explicit designation during the marriage and subsequent divorce. After the first year of marriage, there will be an implicit Statutory Survivor Benefit Designation of the current spouse. This implicit designation would appear to terminate upon a divorce, and the original designation may again become effective if the divorce creates no new statutory benefit designation. *But cf.* *New Orleans Elec. Pension Fund v. DeRocha*, 779 F. Supp. 845 (E.D. La. 1991) (holding that the original designation was terminated by the killing of the participant by the designee).

254. ERISA § 205(c)(6); 29 U.S.C. § 1055(c)(6) (2000).

255. ERISA § 206(d)(3); 29 U.S.C. § 1056(d)(3), discussed, *infra*.

plan fiduciaries fulfilled their responsibilities when they had paid the benefits to the wrong person.²⁵⁶

Thus, if (a) the plan fiduciaries presumed a participant's spouse didn't exist or consented to the designation of another beneficiary, and (b) the fiduciaries complied with its fiduciary obligations to behave prudently in making such a presumption the spouse may not look to the plan for any of the benefit payments previously made by the plan, even if the spouse shows that the presumption was wrong after the plan paid some or all the survivor benefits to another person. However, this fiduciary relief provision gives no relief if the participant died before receiving any plan benefits and the plan decided as a result of a presumption of the lack of a spouse to pay no survivor benefits. The lack of any prior plan payments implies the plan and its fiduciaries need no relief.

There are several approaches by which the plan may pay a surviving spouse the lifetime annuity payments to which he or she is entitled, while the pension plan is relieved from a double benefit payment obligation after having made excessive payments to a participant.²⁵⁷ In *Hearn v. Western Conference of Teamsters Pension Trust Fund*,²⁵⁸ the Ninth Circuit did not discuss any alternatives when confronted with a pension plan that had incorrectly but reasonably presumed that a participant had no spouse, and paid the spouse a single life annuity until his death. Two months after the participant's death, the spouse appeared and requested survivor benefits of \$78/month during her life from the plan. The participant had received nine monthly payments of \$344.00 rather than the \$155.88 to which he was entitled under the statutorily required QJSA designation. The Court held that (a) the participant had been overpaid by a total of \$1,696.50²⁵⁹ and (b) the plan was entitled to defer the start of the spouse's payments for almost twenty-two months, at which point the overpayments would have been fully offset. The court also stated²⁶⁰ that this solution "reconcil[es] the Trust Fund's interests

256. See, e.g., *Atwater v. Nortel Networks, Inc.*, 388 F. Supp. 2d 610 (D.N.C. 2005) (inquiring whether the participant's estate, which it held was otherwise entitled to the survivor benefits, had waived or was estopped from making a benefits claim after the plan had paid a party the court held was not entitled to such survivor benefits).

257. No alternative approaches need be considered if survivor benefits are payable in a lump sum or in a fixed number of installment payments. If the entire value of survivor benefits was paid before the spouse appears, the spouse may not obtain anything from the plan. If part of the value was paid, the spouse would be entitled to the unpaid portion.

258. 68 F.3d 301 (9th Cir. 1995).

259. The product of nine and \$188.50, the amount of the excess monthly payments.

260. *Hearn v. W. Conf. of Teamsters Pension Trust Fund*, 68 F.3d 301, 305

with Mrs. Hearn's in a way that doesn't make either bear the full brunt of Mr. Hearn's perfidy." This statement reasonably presumes that the "perfidious" participant who received a small pension had no assets from which Mrs. Hearn could have recovered the overpayments.²⁶¹ The court did not discuss whether there were more equitable payment options. For example, the surviving spouse could have been provided with an immediate but a reduced annuity; the reduction would continue until the excess was fully credited.²⁶² Under such alternative, the spouse and the plan would share the risk that the spouse would pass away before the participant's overpayments were credited rather than having the spouse bear such risk alone.

A spouse whom the participant incorrectly asserted (a) did not exist, (b) had executed the consent to a beneficiary change, or (c) had voluntarily consented to the participant receiving all the benefits,²⁶³ may still have recourse against the recipient of his or her benefits even if he or she may not obtain the benefits from the plan because its fiduciaries complied with ERISA's fiduciary requirements before paying those benefits to another person. The fiduciary relief statute²⁶⁴ does not change the ERISA Marital Survivor Beneficiary Designation but merely prevents the spouse collecting those benefits from the plan and thereby removes any incentive from the plan to seek to recover the payments it had made to the wrongful recipient.²⁶⁵

(9th Cir. 1995).

261. Otherwise she would have not borne any brunt of the perfidy because she would have been able to recover the wrongful pension payments.

262. *But see Tynan v. American Airlines, Inc.*, No. 04-cv-335-SM, 2005 U.S. Dist. LEXIS 19646 (D.N.H. Sept. 9, 2005), where such an approach was taken with respect to a participant whose future pension payments were reduced to reimburse the plan for what the participant knew were excessive payments. The court placed considerable emphasis on the participant's lack of clean hands when it approved that approach. By contrast, in *Hearn*, the spouse had no apparent responsibility for the overpayments to the participant, but bore the risk of not receiving any of the payments she is owed.

263. The other party or parties may be (1) the participant who received an unauthorized lump sum (*See, e.g., Akrom v. Polley, BP Ret. Accumulation Plan*, No. 06-705, 2006 U.S. Dist. LEXIS 83954 (W.D. Pa. Oct. 11, 2006); *Rice v. Rochester Laborers' Annuity Fund*, 888 F. Supp. 494 (W.D.N.Y. 1995)), (2) the participant who received the larger annual payments payable under a single life annuity (*See, e.g., Vilas v. Lyons*, 702 F. Supp. 555 (D. Md. 1988); *Grodesky v. Lucent Tech.*, No. 01 C 5167, 2003 U.S. Dist. LEXIS 1042 (N.D. Ill. Jan. 23, 2003)); or (3) other individuals who received survivor benefits (*Neidich v. Estate of Neidich*, 222 F. Supp. 2d 357 (S.D.N.Y. 2002)).

264. ERISA § 205(c)(6); 29 U.S.C. § 1055(c)(6) (2000).

265. As in *Hearn*, it is often likely that the wrongful recipient lacks the resources to repay the benefit payments to either the plan or the surviving spouse. This is why depriving the surviving spouse of access to plan funds often means that he or she will not be able to obtain the benefits to which he or she is entitled.

It thus appears that the spouse retains the right under the traditional benefit claim section, ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B),²⁶⁶ to recover all or part of a survivor interest to which he is entitled under the plan terms from the participant, the participant's estate or the unauthorized designee who received those benefits without being entitled to those benefits. The court, however, rejected such a claim in *Kopec v. Kopec*, when the plan fiduciaries had breached their obligations, but the plan had been terminated. The court, nevertheless, permitted the spouse to seek recovery from the participant, who was acting as a fiduciary when he permitted himself to withdraw plan assets without his spouse's consent.²⁶⁷ The court relied on a frequently quoted Second Circuit holding that "in a recovery of benefits claim [under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)], only the plan and the administrators and trustees of the plan in their capacity as such may be held liable."²⁶⁸ However, that case and similar cases all pertain to benefit claims against the plan. Such actions must be brought against plans, administrators or trustees.²⁶⁹ The court was also concerned that the participant could obtain a double recovery by suing both the plan and the participant in his individual capacity. By contrast, we are assuming that a statutory beneficiary is precluded from making a claim against the plan and its fiduciaries²⁷⁰ but retains his or her plan benefit entitlement, so there is no issue of a possible double recovery but an issue of whether any recovery is possible. There seems little equitable or statutory basis for precluding a surviving spouse from seeking relief from the party or parties that wrongfully received the benefits when the spouse may not obtain relief from the plan.

If the traditional benefit claim section, *arguendo*, does not provide any relief, the spouse may be able to resort to the equitable relief provided by ERISA § 502(a)(3) 29 U.S.C. § 1132(a)(3). However that section may not permit the designee to impose personal liability on the person who wrongfully obtained

266. Benefit claims under a terminated plan, however, would be sought under (a) ERISA § 4070(a), 29 U.S.C. § 1370(a) for a single-employer plan, or (b) ERISA § 4301(a), 29 U.S.C. § 1451(a) for a multi-employer plan.

267. 70 F. Supp. 2d 217 (E.D.N.Y. 1999).

268. *Leonelli v. Pennwalt Corp.*, 887 F.2d 1195, 1198 (2d Cir. 1989).

269. See generally William F. Hanrahan & Lars C. Golumbic, *ERISA Benefits Litigation Who Can Be Sued?*, 19 BENEFITS L. J. 20 (Summer 2006).

270. A similar question may be raised if the fiduciaries are exempt not because they fulfilled their ERISA responsibilities but because a statute of limitations has expired with respect to a fiduciary claim, as in *Akrom*, 2006 U.S. Dist. LEXIS 83954 (W.D. Pa.). The statute of limitations against the fiduciaries may have expired because such statutes only generally begin to accrue at the time of the breach, ERISA § 413; 29 U.S.C. § 1113, whereas, statutes pertaining to benefit claims do not begin to accrue until a participant or a beneficiary has exhausted the plan's review procedures.

the benefit because such relief may be considered legal relief rather than equitable relief.²⁷¹ On the other hand, for plans which contain an express agreement between the parties establishing an equitable lien or constructive trust an available form of relief is the imposition of a constructive trust.²⁷² This raises the question of whether a constructive trust is available when there is no such agreement to restrict recoveries to such relief.²⁷³ Statutory designated beneficiaries rarely have such agreements with the person who wrongfully received the designee's benefits, although the beneficiary may be able to base its claim on the plan's agreement with the recipient, if there is such a provision. Moreover, constructive trusts may only be available if a *res* may be identified and traced for a designee to recover under that section.²⁷⁴ Furthermore, designees, unlike plans, may not, as a practical matter, recoup improper payments by offsetting the improper payment against future benefit payments to the payment, as plans whose terms provide for such recoupment may do.²⁷⁵

271. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212-14 (2002); *Sereboff v. Mid-Atlantic Med. Services* 126 S. Ct. 1869 (2006). *Contra* Langbein, *supra* note 59. However, these cases and Professor Langbein all considered the ability of a plan, rather than a beneficiary, to recover plan benefits from a person who had received those benefits even though he was not entitled to them. *Id.*

272. *Id.*; see also Brief for the U.S. Department of Labor as Amicus Curiae, *Green v. Exxon/MobilCorp.* (No.06-1452) available at [http://www.dol.gov/sol/media/briefs/ExxonMobile\(A\)-05-25-2006.htm](http://www.dol.gov/sol/media/briefs/ExxonMobile(A)-05-25-2006.htm) In these cases, the relief sections preclude fiduciary liability. The Department asserted that personal liability may be imposed on a fiduciary whose breach injured a specific beneficiary, such as a fiduciary who failed to obtain life insurance from a third party for a beneficiary, even when the fiduciary is not thereby unjustly enriched, which is the traditional equitable justification for constructive trusts. *Id.*

273. See, e.g., *Popowski v. Parrot*, 461 F.3d 1367 (11th Cir. 2006). Equitable liens for constructive trust are permissible only when an agreement establishes such right. For example for a plan in which the terms specified reimbursement from funds received in a law suit, but not for other plan in which the terms established the right to reimbursement without specifying the source of funds.

274. No such relief was available to a spouse who could not identify a specific *res* that was wrongfully received in *Neidich v. Estate of Neidich*, 222 F. Supp. 2d 357 (S.D.N.Y. 2002). *But cf.* *Sereboff v. Mid-Atl. Med. Services*, 126 S. Ct. 1869 (2006). The court held a constructive trust imposed using "the familiar rule of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing," which arguably occurs with the wrongful recipients of the spouse's benefits. However, there was no tracing of proceeds in that case, but rather a decision by the parties to deposit the amount at dispute with the court. *Id.*; see also David E. Morse, *More Equitable Reflux Bright Line Needed for Whether Fiduciary May Sue Participant*, BENEFITS L. J. 1 (Autumn 2006) (arguing that requirements for an identifiable *res* is not warranted).

275. *Northcutt v. GM Hourly-Rate Employees Pension Plan*, 467 F.3d 1031 (7th Cir. 2006).

Finally, the spouse may also bring state law actions to recover those benefits.²⁷⁶ It may, however, be argued that the collection of plan benefits is at the core of ERISA and thus such state actions are preempted by ERISA, in which case it is hard to preclude the availability of some relief under ERISA.

The Treasury Regulations, which govern spousal consents, pertain to the Code sections similar to ERISA § 205, 29 U.S.C. § 1055,²⁷⁷ also govern those ERISA sections. However, those Code sections²⁷⁸ and the accompanying regulations do not contain or discuss the ERISA fiduciary duties,²⁷⁹ nor do there appear to be any pertinent advisory opinions by the United States Department of Labor (the "DOL"), the agency usually responsible for rules pertaining to fiduciary standards.²⁸⁰ Prudent fiduciaries must balance two concerns. They must comply with two distinct ERISA fiduciary mandates: (a) the Plan Terms Benefit Mandate, i.e., benefits must be paid in accord with the terms of the plan²⁸¹ and (b) the expenses of administering the plan must be reasonable.²⁸²

A plan remains liable for a spouse's survivor benefits, if its fiduciaries act in accord with a beneficiary change without receiving the spouse's consent in the required form. Such errors are sufficiently common that the IRS recently modified its Employee Plans Compliance Resolution System to permit plans that wish to remain tax-qualified to correct such errors by giving spouses the right to obtain the lump sum value of survivor annuity

276. *See, e.g.,* Vilas v. Lyons, 702 F. Supp. 555 (D. Md. 1988). The court suggested that although there was no relief under ERISA because the fiduciaries behaved properly with respect to a waiver presented by a plan participant, the spouse may be able to obtain relief from the participant's estate or the recipients of the plan benefits under state law. However, the basis for such claim was not pursuant to the plan terms but rather an allegation that the participant had breached an agreement to pay the spouse other assets in exchange for the consent. *See generally,* Akrom v. Polley, BP Ret. Accumulation Plan, 2006 U.S. Dist. LEXIS 83954 (W.D. Pa.), *dismissed*, Akrom v. Polley, BP Ret. Accumulation Plan, No. 06-705, 2006 U.S. Dist. LEXIS 82176 (W.D. Pa. Nov. 7, 2006). The court held a spouse deprived of spousal benefits, when her husband forged her signature and withdrew all his plan benefits, had no claim to recover from her former husband, since there was no diversity between the parties. However, the court did not consider the existence of a federal claim against the participant under ERISA § 502(a)(1)(B); 29 U.S.C. § 1132(a)(1)(B). However, the Court, unlike the one in *Vilas*, held that a specific state claim, one for forgery, should be considered by a state court.

277. *See* Reorganization Plan Number 4 of 1978, 43 Fed. Reg. 47,713 (1978) and 29 C.F.R. § 2570.200a-2 (2005).

278. I.R.C. §§ 401(a)(11) and 417.

279. *See* Reorganization Plan Number 4 of 1978, 43 Fed. Reg. 47,713 (1978) and 29 C.F.R. § 2570.200a-2.

280. *Id.*

281. ERISA § 404(a)(1)(A); 29 U.S.C. § 1104(a)(1)(A) (2000).

282. ERISA § 403(c)(1); 29 U.S.C. § 1103(c)(1) (2000).

benefits before the participant's death rather than having to wait to begin receiving benefits until and only in the event that the spouse becomes entitled to annuity benefits by surviving the participant.²⁸³ However, it should be noted that the Spousal Survivor Provisions apply whether or not the pension plan is tax-qualified.

Pension plan fiduciaries would appear to have a relatively simple obligation if a participant claims no consent is needed because his or her spouse is dead or has abandoned him.²⁸⁴ It seems advisable and relatively easy for the pension plan's administrative staff to request and review the face of a death certificate or an order of abandonment for the name and address of the spouse. Exceptions may be made in the rare cases, such as the aftermath of the September 11, 2001 attacks. In such case, a death certificate may not be readily available immediately after the participant's death, although other reliable information may be available.

Pension plan fiduciaries do not appear to have an obligation to look beyond a statement of a participant sworn before a notary that he is unmarried and thus no spousal consent is required, unless they have reason to believe it may not be correct. Conversely, as the court stated in *Rice v. Rochester Laborers' Annuity Fund*,²⁸⁵ "the Plan's administrator cannot, however, ignore obvious warning signs that suggest an obligation to inquire," such as those described in that case. First, the standard plan form which permitted the statutory spousal designation to be changed by the participant was "ambiguous and contrary on its face."²⁸⁶

283. Rev. Proc. 2006-27, 2006-22 I.R.B. 945, Appendix A 6.07(2). The IRS operates this compliance program because pension plans must comply with the consent requirement to qualify for favorable tax treatment. See generally Kathryn Kennedy, EPCRS, 2006 Makeover: Are the Changes More Than Cosmetic?, TAX MGMT. COM. PLANNING J. 1 (Aug. 4, 2006).

284. A spouse who has abandoned a spouse who passes away, like a spouse who predeceases such spouse, has no right to an elective share of the deceased spouse's estate. See, e.g., N.Y. E.P.T.L. § 5-1-2(a)(5). Similarly in states, which base divorce on fault, a spouse who has been abandoned has a right to divorce. See, e.g., N.Y. DOM. REL. art. 12.

285. 888 F. Supp. 494, 498 (W.D.N.Y. 1995).

286. A similar but related breach of fiduciary responsibility claim would be that the consent form was so poorly designed that a forgery of a spouse's signature was facilitated. See, e.g., *Akrom v. Polley*, BP Ret. Accumulation Plan, 2006 U.S. Dist. LEXIS 83954 (W.D. Pa. 2006), *dismissed*, *Akrom v. Polley*, BP Ret. Accumulation Plan, No. 06-705, 2006 U.S. Dist. LEXIS 82176 (W.D. Pa. Nov. 7, 2006). The spouse claimed that the benefit election form was poorly designed and facilitated participant's forgery of her signature. The participant was thus able to withdraw entire account balance without her consent. The former spouse initially made a fiduciary breach claim, which the court held was time-barred. The court did not permit the spouse to change the claim to a benefit claim. If it had, the court could have discussed the form design argument.

The participant stated that he was unmarried and submitted a consent which he claimed has been executed by his spouse. Second, the spouse's attorney had sent a letter warning of the possibility that the participant may submit a forged consent. The court found it irrelevant that the notice was sent to the welfare fund rather than the pension fund, because the funds shared the same offices, telephone number and administrative manager.²⁸⁷ The latter point suggests that there may be an obligation by the plan administrator, particularly of a single employer plan, where the pension plan administrator is often closely related to the employer, to ask whether a participant's employment records are consistent with a claim that a participant has no spouse.²⁸⁸

Pension plan fiduciaries do not appear to have an obligation to look into the circumstances of the execution of consent to give up survivor benefits, unless they are put on notice that the consent may not have been executed voluntarily.²⁸⁹ In *Vilas v. Lyons*,²⁹⁰ the court stated:

The intent of Congress as described in the very words of the Act is to insulate plans under the act from liability if the spousal waiver that is relied on conforms to the requirements of § 1055(c)(2). In the absence of *actual knowledge of fraud or coercion in the inducement or actual knowledge of invalidity*, the plan administrator may rely on a waiver that conforms on its face, and he will not, by doing so, expose himself or the plan to liability for relying on it. This is so even if the waiver turns out in fact to be invalid. Congress intended with good reason to permit plans and their administrators to rely on such waivers much as a holder in due course may rely on a note duly negotiated to him.²⁹¹

In that case, unlike *Rice v. Rochester Laborers' Annuity Fund*, there were no allegations of such knowledge by the plan fiduciaries. Thus, the court held that the spouse had no recourse against the plan, which had distributed to the participant the

287. However, in this case the distinction may have been moot because the pension plan administrator admitted receiving the attorney's notice in his capacity as pension plan administrator.

288. The court's discussion of the reasons for its decision mentioned the close ties between two plans but not the admission that the pension plan administrator actually received the notice.

289. Plan fiduciaries may reduce this obligation by refusing to have their representatives witness the execution of the consent so they have no information about the circumstances of the execution unless someone takes the initiative and puts the fiduciaries on notice that those circumstances need to be reviewed. In such case, the fiduciary would have an obligation to look into the circumstances. However, if a question is not raised until after a plan fiduciary is paying the participant an annuity, the plan and its fiduciaries would only have a prospective concern, assuming they had previously fulfilled their fiduciary duties with respect to the consent.

290. 702 F. Supp. 555, 559 (D. Md. 1988).

291. *Id.* (emphasis added).

balance of the participant's account, on the basis of what appeared to spousal consent to the distribution. Plans have a duty to investigate claims of a fraudulent signature.²⁹² Similarly, a plan could not base a decision to disregard a spouse's claim of a forged consent on the spouse's failure to obtain a court order finding that there was such a forgery.²⁹³ On the other hand, a court upheld the denial of a spouse's claim for survivor benefits that rested solely upon an unsupported assertion that the consent was forged.²⁹⁴ Finally, a court denied summary judgment in a case in which a widow claimed that the participant and plan fiduciary had (a) exercised undue influence on the widow, and (b) concealed parts of the consent from her.²⁹⁵

Pension plan fiduciaries appear to have an obligation to look beyond a statement that no spousal consent is required because the participant cannot locate his spouse. The court held in *Lester v. Reagan Equipment Co. Profit-Sharing Plan* that plan fiduciaries did not fulfill their responsibilities by concluding that a spouse could not be located by simply looking at a notarized statement by the participant which also gave an address and phone number that the participant had used to contact her.²⁹⁶ The court distinguished *Vilas*,²⁹⁷ which held that the fiduciaries satisfied their duty if a consent were valid on its face, unless they have knowledge to the contrary because in such case the issue was whether the spouse has executed the consent. By contrast, the issue in *Lester* was the validity of the participant's statement that he could not locate his spouse. Thus, at a minimum the plan was required to question the participant about his attempts to locate his spouse, and perhaps should have tried to contact the spouse.²⁹⁸

There is more ambiguity about a plan fiduciary's responsibility if the participant claims he or she needs no spousal consent to complete a beneficiary designation because of the existence of an order of a separation or marital dissolution. First,

292. *Lombardo v. United Technologies, Inc.*, No. 3:95CV02353 (WWE), 1997 U.S. Dist. LEXIS 7651 (D. Conn. May 7, 1997).

293. *Grodesky v. Lucent Technologies*, 2003 U.S. Dist. LEXIS 1042 (N.D. Ill. 2003). The court stated that such an order would require a court to review the consent, which was the initial responsibility of the plan under the exhaustion doctrine applicable to benefit claims. *Id.*

294. *Shields v. Readers Digest Ass'n*, 331 F.3d 536 (6th Cir. 2003).

295. *Neidich v. Estate of Neidich*, 222 F. Supp. 2d 357 (S.D.N.Y. 2002).

296. 1992 U.S. Dist. LEXIS 12872, No. 91-2946 § N (E.D. La. Aug. 19., 1992). The plan distributed more than a \$110,000 from a pension plan to the participant after receiving such statement. *Id.*

297. 702 F. Supp. 555 (D. Md. 1988).

298. *See Cobb*, 2006 U.S. App. LEXIS 21476. The Court observed that, prior to the enactment of REACT, plans had no duty to treat spouses of participants as beneficiaries. Under those conditions, plan fiduciaries seemed to have had no duty to ask for anything more than the sworn statement provided by the participant that there was no spouse. *Id.*

such orders, which often deal with multiple issues, require far more review than consents, death certificates, orders of abandonment or statements of inability to locate a spouse, which usually deal with only a single issue. Second, unlike those documents, such orders may, but need not, also serve as statutory beneficiary designations known as QDROs, *infra*. Third, ERISA places the responsibility for the presentation, defense and amendment of QDROs orders on the intended designees rather than the participant, *infra*. However, the participant is generally the one informing the plan of the divorce or separation when he or she claims the ERISA Marital Survivor Beneficiary Designation is inapplicable without presenting a spousal consent. Finally, there appears to be no case law on this issue.

It appears that the fiduciaries' obligations are at least as extensive as those applicable to a participant claiming he or she has no spouse because of death or abandonment. As with a death certificate or order of abandonment, it does not suffice to get a statement of the existence of a domestic relations order from the participant sworn before a notary. It seems advisable and relatively easy for the pension plan's administrative staff to request the participant to provide a certification from the court of entry of such order and the continued viability of such order. The plan staff may review the face of the certificate to verify the parties, date of entry and the description of the order. If those are satisfactory, it would appear reasonable for the fiduciaries to determine that the statutory beneficiary right for the spouse has been thereby extinguished.

It would appear that the plan fiduciaries do not generally need to request the participant to provide the actual order because they do not have a responsibility to review the order to determine if the order is a QDRO (that is, a statutory beneficiary designation, as discussed in this Article). Conducting such reviews as a matter of course may cause the plan to incur significant costs because domestic relations orders often do not satisfy the statutory requirements, although the plan may be able to suggest how the order may be able to be amended to become a QDRO.²⁹⁹ Rather, it

299. *But see, e.g.,* Files v. ExxonMobil Pension Plan, 428 F.3d 478 (3d Cir. 2005), *cert. den'd*, 126 S. Ct. 2304 (2006). The reported customary ExxonMobil response to news of a participant's divorce is to prevent participants from receiving plan benefits until the earlier of the (a) the date the divorce decree is presented, or (b) eighteen months (this period is derived from the QDRO rules regarding plan liability) have passed. The fact pattern was odd because the news of the divorce was given by the participant, who expressed no interest in changing a benefit designation and had not requested any plan benefits even though he was retired. The former spouse's claim for survivor benefits, which was based upon the domestic relations order rather than the Spousal Survivor Designation, was so controversial that it was appealed to the U.S. Supreme Court. *Id.*

seems advisable to let any person who claims such benefits to initiate such review by presenting the plan fiduciaries with the order with the expectation that such party is prepared to seek to have the order amended if necessary.

There is a relatively low cost general policy that a plan fiduciary may adopt if he or she believes that it is not prudent to disregard the risk of a person coming forward to claim survivor benefits after (1) a domestic relations order has been issued; (2) a participant has revoked the statutory beneficiary designation in favor of his spouse without the consent of his or her apparent spouse; and (3) the plan has paid out those benefits to the participant or another person. A letter of the following form could be sent to a participant's spouse or former spouse.

We administer the . . . Pension Plan. P (identify the participant) has (1) stated that an order of separation (or divorce) has been issued to you and P; and (2) instructed us to remove you as the beneficiary of the death benefits that the ____ Pension Plan will pay if P dies before you.

If we do not receive written notice from you within thirty (30) days of the above date of this letter that (1) no order of separation (or divorce) is in effect; or (2) the order that is in effect gives you the right to survivor benefits under ____ Pension Plan, we will assume that P may now remove you as the beneficiary of P's death benefits under the ____ Pension Plan.

The plan would suspend any benefit change and survivor benefit payments until the expiration of the above thirty-day period plus a reasonable period to resolve any challenge that may arise as a result from the letter. Under this procedure the plan fiduciaries would not have to review the terms of the underlying separation or divorce order except in the unlikely event there was a challenge, which prudent plan fiduciaries would prefer to be raised and resolved as soon as possible. Moreover, the spouse or former spouse would have the opportunity to show that the order presented to the plan had not been issued or had been superseded.³⁰⁰ The letter does not preclude the spouse or former spouse from challenging the participant's designation after the thirty days, but by notifying the spouse or former spouse of the plan's intentions to follow the participant's benefit designation, the fiduciaries may safeguard the plan from the risk of having to pay survivor benefits to both the unauthorized designee and the participant's spouse or former spouse.

300. While this may occur with an order of abandonment, it would appear to be so unlikely that fiduciaries can probably disregard this possibility when a participant claims to have been abandoned by his spouse. But see discussion of *Rice, supra*, with respect to possible warning signs about such a submission.

This proposed notice is far less extensive than the one required by statute to be given by medical benefit plan fiduciaries³⁰¹ who wish to terminate coverage for a person when such plan fiduciaries have been notified of an order of separation or divorce issued to a participant.³⁰² On the other hand, many plans may not provide the systematic notices described above because their fiduciaries have decided that the costs of those notices substantially exceed the costs that the plan may incur with respect to what they estimate is the minuscule group of participants who will improperly report an order of separation or dissolution. The latter conclusion may be reasonable in view of the apparent lack of reported litigation with respect to such challenges.

*C. ERISA Marital Survivor Beneficiary Designations, the
Anti-Alienation Prohibition and Traditional Domestic
Relations Principles*

A consent by the spouse to waive his or her survivor rights that complies with the statutory standards will permit the participant to designate another person to be entitled to those benefits.³⁰³ Thus, in concert with the participant's designation, it forms a classical alienation of the spouse's statutory benefit interest in the pension plan.³⁰⁴ Nevertheless, those transactions are effective even though not explicitly exempt from the Anti-Alienation Prohibition. As the Supreme Court stated in *Guidry*,³⁰⁵ when it held that the Anti-Alienation Prohibition superseded the general remedy section of the Labor-Management Reporting and Disclosure Act of 1959:

It is an elementary tenet of statutory construction that "where there is no clear intention otherwise, a specific statute will not be

301. These fiduciaries may, but need not coincide with the fiduciaries of the pension plan covering the same participant. However, even if they are the same, a person acting as a fiduciary of one plan is required to act solely on behalf of such plan under ERISA § 404(a)(1); 29 U.S.C. § 1104(a)(1), and thus may have no obligation to inform the other plan of his knowledge of the participant's divorce or separation.

302. More disclosure is needed in such case because the spouse usually has to pay premiums to obtain continued coverage, known as COBRA coverage. See generally ERISA §§ 601-09; 29 U.S.C. §§ 1161-69 (2000).

303. The consent may either permit the participant to name a specified party or any party. ERISA § 205(c)(A); 29 U.S.C. § 1055(c)(A) (2000).

304. Treas. Reg. § 1.401(a)-13(c)(1)(ii) provides that an assignment or alienation includes: "Any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become payable to the participant or beneficiary." *Id.*

305. 493 U.S. 365, 377 (1990).

controlled or nullified by a general one."³⁰⁶

The ERISA survivor benefit rights of a participant's spouse resemble but may substantially differ from those that would otherwise be available to a spouse under community property state laws or other domestic relations laws. None of the REACT congressional committee reports mention any of these similarities or distinctions or why the QJSA requires a survivor annuity of at least fifty percent of the annuity paid during the joint lives of the participant and the spouse, rather than a smaller or larger percentage. Nor do any of the ERISA Congressional reports, mention why the default joint and survivor annuity initially required by ERISA allocated the spouse the same minimal fifty percent interest. It may have been the simple common sense notion that the surviving spouse will require at least half the support that a married couple requires. Thus, it is reasonable to require that the spouse be provided with an annuity of at least half of the amount, which was paid to the spouse and participant during their joint lives.

The Spousal Survivor Provision computation of a spouse's survivor benefits is simplified by disregarding two customary features of domestic relations laws and property laws. The survivor benefits are not affected by the portion of the pension which accrued before rather than during the marriage as there is no distinction between marital property and non-marital property.³⁰⁷ Nor are the spouse's survivor rights affected by the value of the non-pension assets, if any, that the participant otherwise gives the spouse; there is no attempt to make an equitable distribution of the assets of the participant and the spouse.³⁰⁸ These simplifying assumptions are consistent with the Congressional goal that ERISA encourage the maintenance and establishment of employee benefit plans by avoiding the imposition of any unnecessary administration burdens on those operating ERISA plans, such as would occur by requiring an investigation of documents other than the plan documents or the use of information not customarily part of the sponsor's employment records.³⁰⁹

306. *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

307. See, e.g., Heather Rose, Comment, *Boggs v. Boggs: Creating Real-life Cinderellas*, 33 J. MARSHALL L. REV. 271 (1999), which is quite critical of the statutory allocation that she analogizes to the interests acquired by Cinderella's step-mother.

308. *But cf.* N.Y. EPTL § 5-1.1-A(b)(1)(G) which provides surviving spouses with the right to elect to receive an equitable portion of the deceased spouse's property and includes ERISA pension assets in this calculation. See generally Donald Partland, *Calculating the Value of Qualified-Plan Benefits in Determining the Surviving Spouse's Elective Share*, NYSBA TRUSTS AND ESTATES LAW SECTION NEWSLETTER Fall 2005, 10 (Vol. 38 No. 3).

309. See, e.g., *Varity v. Howe*, 516 U.S. 489, 497 (1996) (noting that Congress

Finally, REACT does not give spouses a devisable interest in the participant's pension benefits if the spouse predeceases the participant.³¹⁰ This treatment is consistent with the ERISA aim of protecting retirement benefits, or lifetime benefits, of the participant and the participant's beneficiaries.³¹¹

VI. ERISA PENSION BENEFICIARY DESIGNATIONS FOR SPOUSES, FORMER SPOUSES, CHILDREN AND DEPENDENTS OF PARTICIPANTS

ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3), (the "QDRO Provisions") requires pension plans to recognize beneficiary designations of spouses, former spouses, children³¹² and dependents³¹³ of participants in accord with the terms of specified state domestic relations orders, which are called qualified domestic relations orders ("QDROs").³¹⁴ Such designees are called "alternate payees."³¹⁵ Alternate payees are treated as plan beneficiaries for all ERISA purposes.³¹⁶ These extensive beneficiary rights are not given to persons entitled to mere offsets against the participant's benefits, such as with (a) a voluntary and revocable assignment of a benefit payment, or (b) pursuant to a court order pertaining to wrongdoing by the participant against the plan.³¹⁷

wished to protect employee benefits without creating a system so complex that administrative costs will discourage employers from offering employer benefit plans).

310. See *e.g.*, *Boggs*, 520 U.S. at 851-52 (Supreme Court rejecting children's claim that their mother could devise a share of the participant's pension benefits when the mother predeceased her husband, the participant).

311. See *id.*; ERISA § 2(a); 29 U.S.C. § 1001(a) (2000).

312. The children appear to be the participant's children rather than the spouse's children unless those children have been adopted by the participant.

313. The dependents appear in most cases to be the children of the spouse or former spouse of a participant. They need not have been adopted by the participant although the participant supported or is supporting them. There are no requirements that dependents need to be minors or children. See, *e.g.*, *Owens v. Auto. Machinists Pension Trust*, No. C06-943Z, 2007 U.S. Dist. LEXIS 7797 (W.D. Wash. Jan. 19, 2007) (holding that the participant's adult companion qualified).

314. See generally, Joan Casilio Adams, *Hot Tips: Retirement and Deferred Benefits: Discovery, Agreements, Proof and QDROs*, NYSBA FAMILY LAW SECTION MEETING (January 27, 2007) [hereinafter QDROs & FAMILY LAW]; Gary Shulman, *THE QUALIFIED DOMESTIC RELATIONS ORDER HANDBOOK* ch. 5 (3d ed. 2006) [hereinafter QDRO HANDBOOK]; Jayne E. Zangelein & Susan J. Stabile, *ERISA LITIGATION* 885-902 (2d. ed 2005 and 2006 Supp.).

315. ERISA § 206(d)(3)(K); 29 U.S.C. § 1056(d)(3)(K) (2000).

316. ERISA § 206(d)(3)(J); 29 U.S.C. § 1056(d)(3)(J) (2000).

317. Both these offsets are set forth as exceptions from the Anti-Alienation Prohibition, but not as beneficiary designations, in the same statute that contains the prohibition. ERISA § 206(d)(2); 29 U.S.C. § 1056(d)(2) (2000); ERISA § 206(d)(4); 29 U.S.C. § 1056(d)(4) (2000).

No regulations discuss the terms of permissible QDROs or the manner by which plans must process QDROs.³¹⁸ An Internal Revenue Service Notice (“IRS QDRO Guide”), however, discusses and presents sample language for QDROs pursuant to a congressional mandate, but disclaims any intention to interpret the statutory requirements.³¹⁹ The DOL maintains an online publication devoted to many of those statutory issues, which is entitled “QDROs; the Division of Pensions Through Qualified Domestic Relations Orders, and Errata”³²⁰ herein designated as the “DOL QDRO Guide.” This publication is of uncertain precedential value. The DOL QDRO Guide contains the IRS QDRO Guide and many DOL Advisory Opinions for which only the individual parties described in the opinion may rely.³²¹ Moreover, the PBGC has also prepared a publication, which was last revised in October 2006 and is entitled “Qualified Domestic Relations Orders & PBGC,” (“PBGC DOL Guide”) presenting sample QDRO language, which are also of uncertain precedential value.³²² All the publications observe that an alternate payee’s interest may have two distinct interests. First, there is an interest in retirement benefits, which is associated with the participant’s life interest. This interest may differ from the payee’s interest in the participant’s survivor benefits.

Welfare plans, including life insurance plans, and pension plans³²³ that are exempt from the requirements of Part 2 of Subtitle B of Title I of ERISA for survivor benefits for spouses are also exempt for the same reason from this pension benefit designation mandate.³²⁴ ERISA § 206(d)(3)(L), 29 U.S.C. § 1056(d)(3)(L) confirms these exclusions by stating that the QDRO Provisions “do[es] not apply to any plan to which paragraph

318. *But see* Interim Final Rule Relating to Time and Order of Issuance of Domestic Relations Orders, 72 Fed. Reg. 10070 (March 7, 2007).

319. IRS Notice 97-11, 1997-1 C.B. 379 [hereinafter IRS QDRO GUIDE]. The notice was released in response to the requirement of Section 1457(a)(2) of the Small Business Job Protection Act of 1996, P.L. 104-188. The Notice reports that the DOL advised the IRS that the discussion and language are consistent with the DOL views.

320. U.S. DEPT’ LABOR, PENSION & WELFARE BENEFITS ADMIN., QDROS; THE DIVISION OF PENSIONS THROUGH QUALIFIED DOMESTIC RELATIONS ORDERS (1997) [hereinafter D.O.L. QDRO GUIDE], available at <http://www.dol.gov/ebsa/publications/qdroerratasheet.html>.

321. According to Section 10 of the ERISA Procedure 76-1, 41 F.R. 36281 (Aug. 27, 1976).

322. QUALIFIED DOMESTIC RELATIONS ORDERS & PBGC (2006) [hereinafter PBGC DOL GUIDE]. The Sample Orders are similar to those in the IRS QDRO Guide, but this publication emphasizes that a QDRO may not require the PBGC to pay alternate payees more than the PBGC guaranteed benefits.

323. Top-hat plans, excess benefit plans, and retirement plans in which all accounts are maintained as IRAs are thus exempt.

324. ERISA § 201; 29 U.S.C. § 1056 (2000).

[206(d)](1) does not apply.” Paragraph 206(d)(1) is the general anti-alienation prohibition, which, as described, only applies to the ERISA pension plans not otherwise exempt. Subsection (d)(3)(L) was enacted together with a similar addition to the corresponding tax-qualification Code Section³²⁵ as part of Section 1898 of the Tax Reform Act of 1986,³²⁶ which is entitled “Technical Corrections to the Retirement Equity Act.” The two provisions were intended to “clarify] that the qualified domestic relations provisions do not apply to any plan to which the assignment or alienation restrictions do not apply.”³²⁷

*A. Domestic Relations Orders That May Be Marital
Dissolution Benefit Designations Called Qualified
Domestic Relations Orders (“QDROs”)*

Domestic relations orders (“DROs”) for the purposes of the QDRO Provisions are defined as³²⁸ (1) any judgment, decree, or order (including approval of a property settlement agreement), which (2) is made pursuant to a state domestic relations law (including a community property law), and (3) relates to the provision of child support, alimony payments or marital property rights to a spouse, former spouse, children or other dependent of the participant. A DRO does not have to arise from a marriage, but may arise from a relationship that is treated like a marriage under domestic relations, such as a couple living together for thirty years who were not legally married in which the participant’s companion was a dependent of the participant.³²⁹ DROs are not restricted to those that are part of the process of obtaining support, a marital dissolution or separation agreement, but include any judgment, decree or order, which “relates to” such matters, such as a judgment to collect unpaid alimony from a participant’s pension benefits.³³⁰ The DOL explained the “relates

325. I.R.C. § 414(p)(9).

326. Section 1898(c)(4) of Pub. L. 99-514, 100 Stat. 2948 (1986).

327. S. REP. NO. 99-313 (May 29, 1986). The final bill made no change to this section other than changing the section number from 1897(c) to 1898(c). Nor was any change made in the explanation. H.R. REP. NO. 99-514, 99th Cong. 2d. Sess., *reprinted in* 1986 U.S.C.C.A.N. 4075, 4941.

328. ERISA § 206(d)(3)(B)(ii); 29 U.S.C. § 1056(d)(3)(B)(ii) (2000).

329. *Owens*, 2007 U.S. Dist. LEXIS 7797. Such a companion was found entitled under a QDRO to fifty percent of the annuity benefits the participant was receiving from an ERISA pension plan.

330. See *In re Marriage of Thomas*, 789 N.E.2d 821 (2003); *Trustees of the Dir. Guild of America v. Tise*, 255 F.3d 66 (9th Cir. 2000); *Hopkins v. AT&T Global Info.*, 105 F.3d 153 (4th Cir. 1997). In each case, QDROs were sought when participant failed to pay support obligations under a divorce, even though those payments were not originally due from pension plans. The first decision describes several similar state holdings. *But cf. DeSantis v. DeSantis*, 714 So. 2d 637 (Fla. Dist. Ct. App. 1998) (asserting that state law may not, however, permit QDROs to be obtained in such circumstances). In Florida, an

to” phrase and the reference to “a community property law” in the DRO definition by stating that:

An order issued in a probate proceeding begun after the death of the participant that purports to recognize an interest with respect to pension benefits arising solely under state community property law, but that doesn’t relate to the dissolution of a marriage or recognition of support obligations, is not a QDRO because the proceeding does not relate to a legal separation, marital dissolution, or family support obligation.³³¹

The DOL footnoted a reference in this section to *Boggs* in which the Supreme Court had held that ERISA preempted a probate order issued after the death of the former spouse attempting to devise her community property interest in the participant’s pension interest. In such case, the order had nothing to do with a marital dissolution, provision of support or alimony—the parties had been married at the time of the spouse’s death.³³²

The DOL principles were illustrated when the Fifth Circuit held, before the issue of the DOL QDRO Guide, in *Bailey v. Board of Trustees of the New Orleans Steamship Ass’n/ ILA Pension Trust Fund* that a probate order giving a former spouse rights to part of the deceased participant’s survivor benefits based on her community property rights could be both a DRO and a QDRO.³³³ The participant retired in 1988, passed away in 1990, and the spouse sought her QDRO in 1995. The probate order stemmed from the marital dissolution in 1972 prior to the enactment of ERISA or REACT and presumably many years before the participant was eligible to receive pension benefits. These two reasons may explain why she did not seek to enforce her rights at the time of the marital dissolution. The court, however, did not discuss the extent to which the community property interests of the former spouse were considered as part of the divorce and thus the degree to which it related back to the divorce.³³⁴

enforcement action is treated as an inappropriate reopening of the divorce decree. The only enforcement mechanisms available are those available to an ordinary creditor, who does not have the right to obtain a DRO. Thus, a former spouse may not access the pension assets of the participant-debtor in such states under this interpretation. See generally, Comment Letter of N.Y. City Bar Association 6 (May 7, 2007) (pertaining to Interim Rule Relating to Time and Order of Issuance of Domestic Relations Orders, available at <http://www.dol.gov/ebsa/pdf/Glover050707.pdf>).

331. D.O.L. QDRO GUIDE, *supra* note 320, Q 1-8, at 7-8; D.O.L. Advisory Opinion, at 90-46A.

332. *Boggs*, 520 U.S. 833 (1997).

333. *Bailey v. Bd. of Trustees of the New Orleans Steamship Ass’n/ILA Pension Trust Fund*, No. 95-2091, 1996 U.S. Dist. LEXIS 231 (E.D. La. Jan. 9, 1996), *aff’d*, 100 F.3d 28 (5th Cir. 1996).

334. The *Bailey* decision rested on the district court decision *Boggs*, 849 F. Supp. 462, 464 (E.D. La. 1994), that a spouse had a community property interest in the participant’s undistributed pension benefits. The Supreme

The same circuit, however, later held in *Rivers v. Central & Southwest Corp.*, that when the pre-ERISA divorce settlement agreement included no mention of the former spouse's community property interest in a pension plan, the former spouse could not obtain a QDRO which would give her a right to survivor benefits which were then being paid to the participant's widow.³³⁵

By contrast, the Ninth Circuit in *Branco v. UFCW Northern California Employers Joint Pension Plan* improperly held, after the issue of the DOL QDRO Guide, that an order issued in a probate proceeding in which the estate of the former spouse was trying to collect a pension obligation relating to the marital dissolution could not be a QDRO.³³⁶ Reference was made to the same two Supreme Court cases that the DOL had referenced: *Egelhoff*,³³⁷ which didn't consider whether an order was a QDRO, and *Boggs*,³³⁸ which presumed without discussion that the order issued in a probate proceeding after the death of the participant's spouse was not a QDRO and held that ERISA preempted such a non-QDRO. The court also referred to a prior Ninth Circuit holding³³⁹ that the "death of the spouse 'divests her of the title of 'spouse or other dependent,' thereby rendering her an unqualified recipient under ERISA." That case was easily distinguishable. The cited case was similar to DOL Advisory Opinion 90-46A, which had been footnoted by the DOL in the excerpt discussed above. In both those cases the estate of a spouse claimed a community property interest in the participant's pension benefits, but such claim did not relate to a marital dissolution or claim for support or alimony. By contrast in *Branco* the estate claim was based on an award of a percentage of the participant's pension payments in a marital dissolution, which award had been made before any pension benefits were available for distribution.³⁴⁰

Court overturned that finding when it presumed that the order was not a QDRO. By contrast, in *Bailey*, the Court presumed the order at issue was a QDRO. If so, the order may divide marital property if those rights arise from community property. However, if the order is not a QDRO the Anti-Alienation Prohibition preempts such order as discussed in *Boggs*.

335. 186 F.2d 681 (5th Cir. 1999). *See also* discussion of the survivor rights of a participant's former and existing spouse, *infra*.

336. *Branco v. UFCW N. Cal. Employers Joint Pension Plan*, 279 F.3d 1154 (9th Cir. 2002). The Court made no mention of the QDRO Guide.

337. 532 U.S. 141 (2001).

338. 520 U.S. 833 (1997).

339. *Ablamis v. Roper*, 937 F.2d 1450, 1456 (9th Cir. 1991).

340. *Branco*, 279 F.3d at 1160 (dissenting opinion); *cf.* *Eller v. Bolton*, 895 A.2d 382 (Md. 2004) (holding that a DRO would become an effective QDRO if the alternate payee were changed from the estate of former spouse to the former spouse who is an eligible alternate payee); *Divich v. Divich*, 665 N.W.2d 109 (2003) (explaining the a QDRO could give the estate of the former spouse her interest in participant's pension plans in event she didn't survive him).

*B. Standards for a Domestic Relations Order ("DRO")
to Be a QDRO*

A QDRO is a DRO that meets specified standards³⁴¹ First, a QDRO must create or recognize the existence of an alternate payee's right to, or assign to, an alternate payee the right to receive all or a portion of the benefits "payable with respect to a participant under a plan."³⁴² A QDRO becomes part of the pension plan³⁴³ and makes the alternate payee a beneficiary under the plan.³⁴⁴ Thus, the right to receive benefits in the definition must refer to the right to receive benefits from the pension plan. "Benefit payable with respect to a participant under a plan" is broader than the phrase "benefits payable to a participant under a plan." The former also includes benefits payable to a survivor. Thus, a QDRO may determine the entitlement of benefits otherwise payable to the participant or a participant's beneficiaries.

A QDRO may not override the rights of an alternate payee under a prior QDRO.³⁴⁵ However, a QDRO may be amended to increase or reduce the rights of the alternate payee or payees for whom it was originally issued.³⁴⁶ The rights of an alternate payee pursuant to the QDRO may not otherwise be reduced. The Anti-Alienation Prohibition would prevent any assignment of those rights to any other person.³⁴⁷

General waivers in DROs of a participant's property or even general pension rights may not be QDROs. The order, judgment or decree must explicitly inform the participant and the court issuing the QDRO of the pension benefits that the participant will thereby surrender the right to receive or designate. In particular, the plan and alternate payee or payees must be clearly identified, the period or number of payments must be specified, and the amount or percentage of benefits allocated to each alternate payee

341. ERISA § 206(d)(3)(B)(i); 29 U.S.C. § 1056(d)(3)(B)(i) (2000).

342. ERISA § 206(d)(3)(B)(i)(II); 29 U.S.C. § 1056(d)(3)(B)(i)(II) (2000).

343. ERISA § 206(d)(3)(A); 29 U.S.C. § 1056(d)(3)(A) (2000).

344. ERISA § 206(d)(3)(J); 29 U.S.C. § 1056(d)(3)(J) (2000).

345. ERISA § 206(d)(3)(D)(iii); 29 U.S.C. § 1056(d)(3)(D)(iii) (2000).

346. See Interim Final Rule Relating to Time and Order of Issuance of Domestic Relations Orders, 72 FR 10070 (March 7, 2007) (issued pursuant to Section 1001 of the PPA of 2006); see also D.O.L. Advisory Opinion 2004-02A. A divorced spouse may agree to modify a QDRO under which he or she received payments to reduce his or her payments. However, if the pension plan does not segregate the amounts in question, while the determination of whether the DRO is a QDRO is being made the plan has no obligation to make retroactive payments to the participant and no authority to reduce future payments to the former spouse to recover such amounts.

347. A former spouse who is designated as the beneficiary of the Spousal Survivor Benefits, may, however, consent to an election by the participant to designate another person to receive the participant's survivor benefits, *infra*.

must be specified.³⁴⁸ A QDRO thus may specify that an alternate payee is entitled to a fraction of or a dollar amount of the participant's benefit payments or the survivor benefit payments, which payments may also be limited in time or in number. These requirements make it difficult for a plan to pay the wrong benefits in good faith to the wrong person when it has been given a QDRO.³⁴⁹

However, there is no explicit statutory requirement that the pension plan make any disclosure to the participant's spouse, who may be considering whether to prepare a QDRO. There is no requirement similar to the extensive disclosure of the relative values of various benefit options that must be made to a married participant, who may elect with his or her spouse's consent to choose a benefit option other than the QJSA³⁵⁰ or to any participant who has a number of distribution options to choose from.³⁵¹ The plan may, however, have an obligation to provide a spouse with such information on request.³⁵² Moreover, even if not required the Plan may wish to provide such information so that plan resources don't have to be expended on poorly prepared draft QDROs.³⁵³ The participant's attorney and the court that issues the DRO will presumably consider those benefit option values if they are explicitly notified of the specific plan, potential beneficiaries and allocated benefits when the order, judgment or decree is drafted and reviewed.³⁵⁴

The QDRO Provisions prohibit QDROs from³⁵⁵ "provid[ing] any type or form of benefit, or option, not otherwise provided under the plan." This is consistent with the statutory purpose for the QDRO Provisions as stated by the Supreme Court:

348. ERISA § 206(d)(3)(C); 29 U.S.C. § 1056(d)(3)(C) (2000).

349. *See, e.g.*, *Hawkins v. C.I.R.*, 86 F.3d 982, 991 (10th Cir. 1996); *Metrop. Life Ins. v. Wheaton*, 42 F.3d 1080, 1084 (7th Cir. 1994); *Carland v. Metrop. Life*, 935 F.2d 1114, 1120 (10th Cir. 1991).

350. *See id.* at n.54.

351. *Treas. Reg.* § 1.411(a)-11(c)(2) (2005).

352. Spouses who are entitled to benefits under the Spousal Survivor Provisions are already entitled to considerable plan information because they are beneficiaries. *See, e.g.*, ERISA §§ 101, 102, 104; 29 U.S.C. §§ 1021, 1022, 1024 (applying to both participants and beneficiaries).

353. Even if the person requesting plan data is not a spouse with beneficiary rights but another potential alternate payee, such as a child, is seeking such information, it is advisable for the plan to provide such information and thereby make the process of obtaining a QDRO much more efficient if the requester shows the request is being made in connection with a domestic relations proceeding. D.O.L. QDRO GUIDE, *supra* note 320, Q 2-1.

354. *See Majauskas v. Majauskas*, 463 N.E.2d 15 (1984) (providing an example of the formula used in New York to allocate pension benefits). *But see* QDRO HANDBOOK, *supra* note 314 (arguing that attorneys and their clients often incorrectly value benefits and benefit options).

355. ERISA § 206(d)(3)(D)(i); 29 U.S.C. § 1056(d)(3)(D)(i) (2000).

The QDRO provisions protect those persons who, often as a result of divorce, might not receive the benefits they otherwise *would have had available* during their retirement as a means of income.³⁵⁶

This prohibition prevents QDROs from providing either (a) payment options not otherwise permitted under the terms of the plan, such as lump sums under those traditional pension plans which only provide lifetime annuity benefits, or (b) benefit elections not otherwise permitted under the terms of the plan, such as retroactive investment, beneficiary or benefit form selections.³⁵⁷

This prohibition does not prevent correction payments such as one by a plan which pays only single lump sum payments, but whose fiduciaries subsequently learn that the original payment, whether made under a QDRO or otherwise, was too small and then become obligated to make a correction payment.³⁵⁸ Nor does it prevent a former spouse from retaining survivor spousal rights after a marital dissolution.³⁵⁹ Furthermore, if the plan's only survivor benefit is provided under the Spousal Survivor Provisions, only a former spouse or current spouse may obtain such benefits under a QDRO.³⁶⁰ Thus, a QDRO may not entitle the participant's children or other dependents to those survivor

356. *Boggs*, 520 U.S. at 854 (emphasis added).

357. The effectiveness of QDROs issued on a *nunc pro tunc* basis to overcome election timing issues is discussed, *infra*.

358. *See, e.g.*, *Fox v. Fox*, 167 F.3d 880 (4th Cir. 1999).

359. Retaining spousal benefit rights after a marital dissolution may be considered as within the terms "creates" or "recognizes" an alternate payee's benefit rights that are part of a definition of a QDRO. *See also* Part I.E.; IRS QDRO GUIDE, *supra* note 319, at Appendix A. In D.O.L. Advisory Opinion 2000-09A, the DOL held that a QDRO may give a former spouse an entitlement to survivor benefits the plan limits to the participant's spouse, minor or parents. The DOL relied on the provision that QDROs apply to "benefits with respect to a participant" rather than merely "the benefits payable to the participant." Moreover, the DOL observed the former spouse was eligible to the benefit prior to the divorce; thus, the QDRO was merely permitting the benefit to continue after the divorce.

360. *See* D.O.L. QDRO GUIDE, *supra* note 320, Appendix D, at 97; IRS Notice 97-11, Appendix E, 1997-2 I.R.B. 49 (Jan. 13, 1997). Under the plan terms the benefit is not available to a child or dependent of the participant. *See also* *Hamilton v. Washington State Plumbing & Pipefitting Nat'l Pension Fund*, 433 F.3d 1091 (9th Cir. 2006) *cert denied*, 127 S. Ct. 86 (Oct. 2, 2006). Children may not be designated the beneficiaries of a participant's spousal survivor benefits under the terms of a QDRO. Thus, if children are designated as the default beneficiaries in the event there is no spouse, a new spouse will become entitled to the spousal survivor benefits. The court, however, suggested in dicta that the former spouse could have been awarded the survivor benefits under a QDRO and then "transferred" her benefits to her children. However, the court did not consider whether the Spousal Survivor Provisions would permit such a transfer, although of course she could have paid the annuity benefits she received from the plan to her children in such case. *Id.*

benefits. On the other hand, if the pension plan provides survivor benefits in addition to those required by the Spousal Survivor Provisions, a child or dependent may be designated as a beneficiary for those benefits under a QDRO.

C. The ERISA Marital Dissolution Beneficiary Designation May Provide the Beneficiary with Either a Shared or a Separate Interest in the Benefits Payable with Respect to a Participant

The DOL QDRO Guide, the IRS Guide and the PBGC Guide provide that the benefits payable with respect to a participant may be (1) shared with an alternate payee (or payees), so that the payee obtains a fraction of the payments, which would otherwise be made to the participant at the time the participant chooses to have payments made, or (2) be split into separate interests so that the alternate payee may independently decide the form and timing of the payments.³⁶¹ If the alternate payee does not choose to simply obtain all or a portion of the surviving spouse benefits, as discussed, *supra*, survivor benefits, may have to be accounted for separately in each case.³⁶² Thus, payments during the participant's life may go entirely to the alternate payee, while the survivor benefits go to another person, such as a later spouse.³⁶³

A separate interest other than those in survivor benefits would appear to violate the prohibition on QDROs requiring "any type or form of benefit, or option, not otherwise provided under the plan."³⁶⁴ Pension benefit plans generally permit only participants to make elections with respect to survivor benefits, and then only with respect to distribution options and with spousal consent.

361. D.O.L. QDRO GUIDE, *supra* note 320, Q 3-3, at 29-31; *see also* Part I.C.3; IRS QDRO GUIDE, *supra* note 319, at Appendix A; PBGC DOL GUIDE, *supra* note 322, at 4.

362. D.O.L. QDRO GUIDE, *supra* note 320, Q 3-5; QDROs & FAMILY LAW, *supra* note 314, at 12; QDRO HANDBOOK, *supra* note 314, at 6-7. The right to a survivor interest is distinct from the right to share payments with the participant. If the participant chose the maximum payments during his or her lifetime he or she would receive a single life annuity and there would be no survivor interest. Questions about the right to the survivor interest may also arise with a separate interest, if the participant dies before the alternate payee has selected the form of the separate interest. In such case, there may be a question whether there is any interest survives for which a benefit election may be made.

363. ERISA § 206(d)(3)(B)(i)(I); 29 U.S.C. § 1056(d)(3)(D)(I) (2000); *see, e.g.*, *Hopkins v. AT&T Global Info.*, 105 F.3d 153 (4th Cir. 1997). All lifetime payments were awarded to the alternate payee to fund child support and alimony but the current spouse was entitled to the survivor benefits.

364. ERISA § 206(d)(3)(D)(i); 29 U.S.C. § 1056(d)(3)(D)(I) (2000). Shared payment arrangements do not violate this requirement because in those cases the pension plan is providing the benefits the participant requested. All benefits provided under the plan, other than spousal benefits, may be made to alternate payees. ERISA § 206(d)(3)(B)(i)(I); 29 U.S.C. § 1056(d)(3)(B)(i)(I) (2000).

Separate interests in which alternate payees make elections with respect to benefits other than survivor benefits thus raise questions about whether the benefits are otherwise provided by the plan.³⁶⁵ The DOL has stated that separate pension interests are generally obtained before a participant chooses the form and timing of payments without discussing whether separate interests may always be obtained in such circumstances.³⁶⁶

The QDRO Provisions explicitly exempt separate interests under specified circumstances from the requirement that a QDRO may not require a benefit, or option not otherwise provided under the plan.³⁶⁷ In particular, an alternate payee may become entitled to payments in any form in which such benefits may be paid to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and the payee's subsequent spouse)³⁶⁸ if on the date as of which the payments begin the participant (a) has not separated from service,³⁶⁹ (b) is treated as if he or she retired on such date,³⁷⁰ and (c) on such date the participant was either (1) was entitled to such payments without separating from service, or (2) had attained age fifty and would have been entitled to those payments if the participant had separated from service.³⁷¹

The separate interest may be all or part of the benefit accrued as of the date payments are to begin.³⁷² However, those payments may not incorporate any early retirement subsidies.³⁷³ If the pension plan makes lump sum payments available while the participant is employed, as is often the case with a defined contribution (DC) plan, the alternate payee may use a QDRO to obtain part or all of the participant's account balance while the participant is employed whether or not the participant decides to

365. The two other statutory exceptions to the Anti-Alienation Provisions provide only shared payments, otherwise known as offsets. ERISA § 206(d)(2); 29 U.S.C. § 1056(d)(2) (2000) (providing a revocable offsets to a third party of benefit payments are permitted); ERISA § 206(d)(4); 29 U.S.C. § 1056(d)(4) (offsetting to compensate the plan for fiduciary violations by a participant-fiduciary).

366. D.O.L. QDRO GUIDE, *supra* note 320, Q 3-3, at 29-31.

367. ERISA § 206(d)(3)(E); 29 U.S.C. § 1056(d)(3)(E) (2000).

368. ERISA § 206(d)(3)(E)(i)(III); 29 U.S.C. § 1056(d)(3)(E)(i)(III) (2000). This provision, however, permits an alternate payee to obtain a joint and survivor annuity if the survivor benefits are not provided to the alternate payee's spouse.

369. ERISA § 206(d)(3)(E)(i)(I); 29 U.S.C. § 1056(d)(3)(E)(i)(I) (2000).

370. ERISA § 206(d)(3)(E)(i)(II); 29 U.S.C. § 1056(d)(3)(E)(i)(II) (2000).

371. ERISA § 206(d)(3)(E); 29 U.S.C. § 1056(d)(3)(E) (2000).

372. ERISA § 206(d)(3)(E)(i)(II); 29 U.S.C. § 1056(d)(3)(E)(i)(II) (2000); ERISA § 206(d)(3)(B)(i)(I); 29 U.S.C. § 1056(d)(3)(B)(i)(I) (2000).

373. *Id.* There is no such prohibition on early retirement subsidies when the alternate payee shares payments with the participant. *See, e.g.*, D.O.L. QDRO GUIDE, *supra* note 320, Q 3-7, at 37-39.

take a plan distribution. No age requirement need be satisfied because the participant is entitled to the distribution before separating from service. If the pension plan provides only the traditional pension benefits from a defined benefit (DB) plan (lifetime annuity benefits plus the survivor benefits required under the Spousal Survivor Provisions) the payee may obtain part or all of those annuity payments beginning before the participant's actual retirement but after the participant had attained age fifty and would have been entitled to annuity payments if he had separated from service on such date. The alternate payee's annuity, would, however, be based on the payee's lifetime rather than the participant's lifetime.³⁷⁴

ERISA does not explicitly exempt any other separate interests (i.e., give an alternate payee the right to receive plan benefits even though the participant has not elected to begin receiving benefits) from the requirement that the alternate payee's benefit be otherwise available under the plan. Thus, it would appear an alternate payee may not otherwise obtain a separate interest. If there were an implicit exception there would have been no need for the explicit exemption.³⁷⁵ In particular, separate interests would not seem to be permissible when a participant has separated from service but has not begun to receive pension benefits even though the participant has a right to begin receiving those benefits.³⁷⁶

The legislative history sheds no light on the significance of the separate interest requirement that the participant be employed and not receiving pension plan payments. Congress seemed to focus exclusively on the concern that QDROs could be rendered meaningless if a participant could prevent alternate payees from receiving benefits other than survivor benefits by never terminating his or her employment. Congress apparently did not consider whether the same could be done by a participant who left the employer but chose not to begin to receive plan

374. The younger the annuitant, the greater the annuitant's length and number of expected payments. Thus, the annual payments must be smaller to have the same present value as an annuity with fewer expected payments.

375. The explicit exception ERISA § 206(d)(3)(E); 29 U.S.C. § 1056(d)(3)(E) (2000), which permits an alternate payee to receive plan benefits even though the participant has not elected to begin receiving plan benefits, references no such implicit provision.

376. This often occurs when an individual who leaves with a vested benefit wishes to keep his pension funds invested in his or her former employer's plan even after the individual becomes eligible to receive pension benefits. In addition to favorable investment experience, the participant may also gain cost of living increases or the benefits of actuarial adjustments for starting payments later. Section 1102 of the PPA of 2006 encourages participants, who are entitled to plan distributions, to keep his or her pension funds invested in the plan by requiring plans to provide notice to individuals qualifying for plan distributions of the "consequences of failing to defer" receipt of the distributions.

distributions.³⁷⁷ Thus, it appears that a QDRO may not apportion separate benefits between the alternate payee or payees and a participant who has separated from service for benefits payable before the date, if any, the participant decides to begin receiving his pension payments.³⁷⁸ Of course, the QDRO may provide such an alternate payee or payees with the right to receive survivor benefits otherwise available under the plan because such benefits are presumably available under the plan.

If the pension plan lets the participant choose a variety of benefits (including, but not necessarily limited to, the timing), then a designation of a separate interest gives the alternate payee the right to designate a portion of the participant's pension plan benefits other than the participant's survivor benefits. Thus, such QDROs often include not only the words "a separate interest," but some reference to the payee's right to exercise benefit options.³⁷⁹ However, the QDRO provisions require that a QDRO describe "the amount or percentage of the participant's benefits" to be paid to an alternate payee,³⁸⁰ but do not explicitly require a QDRO to distinguish between shared payments and a separate interest or between survivor benefits and retirement benefits.³⁸¹ Thus, there may be a dispute about the significance of a designation, such as "fifty percent of the participant's pension" for a DB plan that

377. H.R. REP. NO. 98-655 Part I, 40 (April 5, 1984) (providing that a payee can collect "regardless of whether the participant continues to work past the early retirement age"); H.R. REP. NO. 98-655 Part II, 19 (May 17, 1984); S. REP. NO. 98-575, 20 (August 6, 1984) (providing that a payee can collect "whether or not the participant actually retires on that date"). None of the Committee Reports mentioned a case where the participant was alive but not working on the date the alternate payees wished payments to begin.

378. *But see* Files v. ExxonMobil Pension Plan, 428 F.3d 478, *cert. denied*, 126 S. Ct. 2304 (3d Cir. 2005) (the issue was not considered as the court held that such a separate interest QDRO was created after participant had separated from service but had not asked that plan benefits begin); *Thomas*, 789 N.E.2d at 832 (holding that a QDRO may provide an alternate payee "all or a portion" of pension benefits under ERISA § 206(d)(3)(B)(i)(I); 29 U.S.C. § 1056(d)(3)(B)(i)(I) (2000)). In both cases, the alternate payee did not need to wait for the participant to request pension payments to begin from his former employer's plan. There is no discussion how this is a form of payment otherwise provided by the plan since it would appear that the plan only permits participants to decide on timing of the payment. The separate interest rules were inapplicable because the participant was no longer employed by the plan sponsor. *Id.*

379. Separate interests, which do not provide such benefit options often describe the timing of the payments, such as an annuity for the life of an alternate payee beginning immediately, or as of the attainment of a certain age.

380. ERISA § 206(d)(3)(C)(ii); 29 U.S.C. § 1056(d)(3)(C)(ii).

381. Proposed draft language for both shared payments and separate interests may, however, be found in the IRS QDRO Guide and the PBGC Guide. In both cases, retirement benefits and survivor benefits are distinguishable.

provides life annuities to participants and survivor benefits only to surviving spouses. Is the intention to provide for a separate interest or for shared payments? What is the intention about survivor benefits? Is the designee entitled to (A) half of the participant's payments (without any interest in the associated survivor benefits), (B) half of the participant's payments plus half of the survivor benefits if the participant began to receive plan payments, (C) half of the participant's payments plus half of the survivor benefits, whether or not the participant began to receive plan payments, or (D) half of the benefits³⁸² payable with respect to the participant (this would mean half of the value of the sum of the participant's retirement benefits and the survivor benefits)?³⁸³ Plans thus sometimes reject DROs with these provisions and ask for more clarity.³⁸⁴

The DOL has stated that shared payments are generally sought when the participant is already receiving his retirement benefits,³⁸⁵ so that neither the form nor the timing of the payments may be changed under the plan terms.³⁸⁶ QDROs with shared payments may also be prepared before the participant is receiving any plan payments when there may be uncertainty as to the payment's starting date or whether the participant will ever be entitled to any plan payments. QDROs thus may also but need not provide alternate payees with a portion of the participant's survivor benefits.³⁸⁷ Pre-retirement survivor benefits are generally determined by post-retirement survivor benefits.³⁸⁸ Thus, if post-

382. This would refer to half of the value of the sum of the participant's retirement benefits and the survivor benefits.

383. *See, e.g., Files*, 428 F.3d 478; *Guzman v. Commonwealth Edison*, No. 99 C 582, 2000 U.S. Dist. LEXIS 18869 (N.D. Ill. Dec. 26, 2000); *Samaroo v. Samaroo*, 193 F.3d 185 (3d Cir. 1999). The latter two found the alternate payee was entitled to no survivor benefits, but the former held the alternate payee was entitled to her own separate interest including a survivor interest. *See also Payne v. GM/UAW Pension Plan*, No. 95-CV-73554-DT, 1996 U.S. Dist. LEXIS 7966 (E.D. Minn. May 7, 1996). In that case, however, the former spouse was held to be entitled to all the survivor benefits even though the divorce only gave her 45% of the participant's pension.

384. *See, e.g., Stahl v. Exxon Corp.*, 212 F. Supp. 2d 657 (S.D. Tex. 2002) (rejecting a draft QDRO for not specifying benefit distribution when order gave alternate payee: "50% of total funds in account of annuity plan on specified date").

385. Lifetime pension benefits are sometimes described as retirement benefits. D.O.L. QDRO GUIDE, *supra* note 320, Q 3-1, at 27.

386. *Id.* at Q 3-3, 29-31. Some DC plans, however, may permit changes in the timing and form of non-annuity payments, such as a fixed number of payments, after the start of such payments. Some DB plans, however, permit changes in annuity selection after the annuity payments have begun if an individual's benefit payments are suspended because the individual returns to work. Treas. Reg. § 1.401(a)-20 Q-A-10(d) (2005).

387. D.O.L. QDRO GUIDE, *supra* note 320, Q 3-1, at 28.

388. *See ERISA* § 205(e); 29 U.S.C. § 1055(e), (defining the required spousal

retirement survivor benefits are not sought, pre-retirement benefits will not be available. There is often a rational basis for an alternate payee not seeking survivor benefits; the shared participant's monthly annuity payments, which the QDRO splits, will be larger if no or only some survivor benefits are funded. Alternate payees often bring claims for survivor benefits if the participant dies before the pension payments begin.³⁸⁹

*D. QDROs May Be Perfected After the Participant's Death
But May Not Increase a Plan's Actuarial Costs*

QDROs are prohibited from "increasing the plan's actuarial costs for benefits"³⁹⁰ (the "Actuarial Cost Increase Prohibition"). This prohibition may apply only to separate interests because shared payments, which split payments between the participant and the alternate payee, do not affect the actuarial costs for benefits, which are the present values of the expected costs of those benefits.³⁹¹ There is no exception for *de minimis* increases. Actuarial costs may only be an issue with respect to those benefits whose present value is determined by actuarial techniques (that is, by those techniques which use the expected lifetime of the recipient or recipients to determine the pension plan's expected payout). Such benefits are annuities over the life or lives of one or more individuals, the standard form of benefit for DB plans,³⁹² and are provided by those DC plans required to provide spousal survivor annuities.³⁹³ Even in those cases, the prohibition is relevant only if the choice of a particular annuity³⁹⁴ is at issue in the proposed QDRO.

Gary Shulman, the author of the well-regarded QDRO treatise, the QDRO Handbook, argues that the Actuarial Cost Increase Prohibition prevents an alternate payee who receives a separate interest in the "benefits payable with respect to a participant under the plan" from obtaining a benefit form whose

pre-retirement survivor benefits in terms of the required retirement survivor benefits).

389. See, e.g., *Sanzo v. NYSA-ILA Pension Fund*, No. 04-300 (WGB), 2005 U.S. Dist. LEXIS 37572 (D.N.J. Dec. 28, 2005).

390. ERISA § 206(d)(3)(D)(ii); 29 U.S.C. § 1056(d)(3)(D)(ii) (2000).

391. Actuarial costs depend on the expected lifetime or lifetimes and the interest rate or rates used to value the stream of payments. Actuarial costs may and often differ from the actual costs in individual cases. For example, an individual's benefit will cost less than its actuarial cost if the individual's actual lifetime is less than the expected lifetime, and cost more if his or her lifetime exceeds expectations.

392. ERISA § 3(23); 29 U.S.C. § 1002(23) (2000).

393. ERISA § 205(b); 29 U.S.C. § 1055(b) (2000).

394. Pension annuities basically take three forms: (1) single life annuities; (2) joint and survivor annuities; and (3) term certain annuities (which may be single life or joint and survivor with the added feature that there is a guarantee of a fixed number of payments).

present value exceeds that of the interest.³⁹⁵ In particular, Mr. Shulman asserts that the Actuarial Cost Prohibition prevents a participant's former spouse who is given fifty percent of the participant's interest with respect to a DB plan from receiving a single life annuity with a present value that exceeds fifty percent of the participant's interest. For example, the former spouse may not receive a life annuity with the same annual payments to which the participant is entitled under a life annuity starting the same date when the former spouse is far younger than the participant and may expect to collect substantially more payments than the spouse. However, the QDRO Provisions permitting QDROs to provide separate interests already require that such interest must take into account only the present value of the participant's accrued benefits as of the date the payments must begin.³⁹⁶ This means the separate interest must be the actuarial equivalent of the accrued benefits.³⁹⁷ Thus, the Actuarial Cost Increase Prohibition is not needed to prevent such a disparity and must have a different function.

The prohibition on a benefit or option not otherwise provided by the plan³⁹⁸ is distinct from the Actuarial Cost Increase Prohibition.³⁹⁹ As stated in the Senate and House Reports⁴⁰⁰ accompanying REACT, the Actuarial Cost Increase Prohibition does not prevent "the payment of benefits to which the participant

395. QDRO HANDBOOK, *supra* note 314, at 6-4; *see also* *Marker v. Northrop Grumman Space & Missions Sys. Pension Plan*, No. 04 C 7933, 2006 U.S. Dist. LEXIS 75507 (N.D. Ill. Oct. 4, 2006) (noting that a former spouse was entitled to pre-retirement survivor benefits under a posthumous QDRO even though the original divorce order provided the spouse only with post-retirement survivor benefits because the court held that pre-retirement benefits had the same value as the post-retirement benefits). The court did not distinguish between the prohibition on increased actuarial costs and the prohibition on benefits not provided under the plan terms. The issue was not whether pre-retirement survivor benefits would be available, but whether they were available retroactively when there was no longer any question about their value. The actuarial costs of the provision of pre-retirement and post-retirement survivor benefits exceeds the cost to provide only post-retirement survivor benefits as is shown by the fact that the former spouse was litigating for those benefits.

396. ERISA § 206(d)(3)(E)(i)(II); 29 U.S.C. § 1056(d)(3)(E)(i)(II).

397. ERISA § 204(c)(3); 29 U.S.C. § 1054(c)(3). Early retirement benefit subsidies are not permitted for separate interests, thus, that common source of actuarial increases in benefits is explicitly prohibited. ERISA § 206(d)(3)(E)(i)(II); 29 U.S.C. § 1056(d)(3)(E)(i)(II) (2000).

398. ERISA § 206(d)(3)(D)(i); 29 U.S.C. § 1056(d)(3)(D)(i) (2000).

399. ERISA § 206(d)(3)(D)(ii); 29 U.S.C. § 1056(d)(3)(D)(ii) (2000). As discussed, *infra*, the immediately preceding provision prevents a QDRO from overriding the right to survivor benefits of a different individual after the date the participant begins collecting benefits if the participant does not have the right to designate a different beneficiary.

400. H.R. REP. NO. 98-655 Part 2, 98th Cong. 2d. Sess. at 19; S. REP. NO. 98-575, 98th Cong. 2d. Sess., *reprinted in* 1984 U.S.C.A.N. at 2566.

would be entitled in the absence of the order.” In particular, it does not prevent alternate payees from obtaining the benefit option with the greatest actuarial value, such as subsidized early retirement benefits, which are not available with a QDRO that provides a separate interest rather than shared payments.⁴⁰¹

The Actuarial Cost Increase Prohibition, instead, would appear to prevent an alternate payee from using the feature of a QDRO not generally available with other benefit designations namely the ability to choose a retroactive effective date for a QDRO,⁴⁰² to increase the plan’s actuarial costs by selecting a benefit option that will be more costly for the plan.⁴⁰³ This will occur if the alternate payee may choose a survivor benefit instead of sharing payments with the participant after he or she learns of the participant’s death.⁴⁰⁴ To prevent an alternate payee from thereby “wreak[ing] actuarial havoc on administration of the Plan,”⁴⁰⁵ alternate payees are thus subject to the same limitation

401. Such enhancements, which are called subsidies, are prevented when an alternate obtains a separate interest of the participant’s benefits. ERISA § 206(d)(3)(E)(i)(II); 29 U.S.C. § 1056(d)(3)(E)(i)(II) (2000). By contrast, there is no similar prohibition if the alternate payee shares early retirement benefits with a participant. See, e.g., D.O.L. QDRO GUIDE, *supra* note 320, at 38, 94-95.

402. *But see* Treas. Reg. § 1.417-1(b)(3), which allows pension plans to permit retroactive choices of distributions by participants. Thus, the Actuarial Cost Increase Prohibition may not apply to plans to the extent the QDRO satisfies such plan’s permissible retroactive standards.

403. Most plans permit participants and their spouses to do this to some extent because participants may choose their benefit form when they know they may not have a long life expectancy. In such a case, it is prudent for the participant to choose a joint and survivor annuity rather than a single life annuity. See, e.g., *Estate of Becker v. Kodak* 120 F.3d 5 (2d Cir. 2000) (noting that the Administrator’s failure to disclose lump sum benefit option as well as annuity option to very sick participant was a breach of fiduciary duty).

404. The Actuarial Increase Cost Prohibition thus limits but does not eliminate the ability of participants to make such “favorable” benefit selections.

405. *Samaroo*, 193 F.3d at 190. The original divorce decree entitled the former spouse to half of the participant’s pension beginning when the participant would begin receiving pension, but he died while still an active employee. The court disregarded a *nunc pro tunc* order providing a former spouse with pre-retirement survivor benefits which she prepared after she learned of the participant’s death—all prior draft QDROs had no such provision. The court did not discuss whether the pension payment amount specified in the prior draft QDROs was associated with a single life annuity for the participant. If so, this would support the proposition that the parties did not intend to provide her with either pre-retirement or post-retirement survivor benefits. The court, however, focused on whether the plan could fix its benefit liability at the time of the participant’s death. This seems a dubious focus because plans are liable for spousal survivor benefits even if the plan does not learn of the participant’s spouse until after his or her death. Rather, the concern would seem to be whether the survivor benefits were selected after the alternate payee knew of the participant’s death, which

as pension plan participants.

Pension plan participants may not generally change their choice of joint and survivor annuities after the annuity payments have begun to be made.⁴⁰⁶ This argument, which asks whether there is a postmortem change in the designation to determine whether the postmortem DRO is a QDRO is also consistent with the Section 1001 of the PPA of 2006 and the interim final rule issued by the DOL pursuant to such statute.⁴⁰⁷ That section permits DROs to be revised to become a QDRO⁴⁰⁸ and provides that a DRO does not fail to be a QDRO solely because of its time of issue.⁴⁰⁹ The difficulty with such a DRO does not arise solely because of the timing of the change to the DRO but because the form of payment was changed after the participant's death to increase the plan's actuarial costs.⁴¹⁰

If a proposed QDRO provides an alternate payee with enhanced lifetime retirement benefits in exchange for no survivor benefits, the Actuarial Cost Increase Prohibition prevents the surviving spouse from modifying a DRO to obtain survivor benefits or a greater percentage of survivor benefits than was the case with the earlier DRO and saying "Whoops, I made a mistake" after the participant dies unexpectedly.⁴¹¹

substantially enhanced the value of those survivor benefits and thus the plan's actuarial costs. *Id.*

406. *See, e.g.,* *Holloman v. Mail-Well Corp.*, 443 F.3d 832 (11th Cir. 2006) (finding that spousal survivor benefits were available only to spouse to whom participant was married when J & S payments began); *McGowan v. NJR Serv. Corp.*, 423 F.3d 241 (3d Cir. 2005) (holding that a QDRO may not change former spouse individual with rights to survivor benefits after J & S payments had begun. Two attempts were rejected, one to replace the former spouse with an earlier spouse and one to replace the former spouse with a spouse acquired substantially after the participant began receiving pension benefits). Some DB plans, however, permit changes in annuity selection after the payments have begun if an individual's benefit payments are suspended because the individual returns to work. Treas. Reg. § 1.401(a)-20 Q-A-10(d) (2005).

407. 72 FR 10070 (March 7, 2007).

408. *Id.* § 1001(1)(A).

409. *Id.* § 1001(1)(B).

410. *See also* Comment Letter of New York City Bar Association 10 (May 7, 2007) (pertaining to Interim Rule Relating to Time and Order of Issuance of Domestic Relations Orders), available at <http://www.dol.gov/ebsa/pdf/Glover050707.pdf>.

411. *See, e.g., Samaroo*, 193 F.3d 185; *Sanzo*, 2005 U.S. Dist. LEXIS 37572. In both cases the original QDRO entitled the former spouse to a share of each specified retirement payment to the participant, but had no provision for any survivor benefits. The participant died before receiving any pension payments and no one was entitled to any survivor payments. Some alternate payees may have been unaware of this trade-off, but if so, their quarrel is with their divorce counsel rather than the plan: whether as in *Samaroo*, the payee had selected a benefit designation without a share of pre-retirement survivor benefits, or as in *Sanzo*, where the participant died a month after obtaining a

On the other hand, if a proposed QDRO provides an alternate payee with survivor benefits, the Actuarial Cost Increase Prohibition does not prevent a modified and effective QDRO from providing those same benefits, whether or not the participant dies during the modification.⁴¹² Permitting such changes in features of the DRO other than its benefit options of the DRO will not increase actuarial costs.⁴¹³ Moreover, in *Patton v. Denver Post*,⁴¹⁴ the Fifth Circuit held that a former spouse who had obtained half of the survivor benefits from one but not both of the participant's pensions and clearly intended to obtain half of the survivor benefits in each of the participant's pensions was entitled to survivor benefits from both plans. In this case, despite due diligence by the former spouse,⁴¹⁵ she did not learn of the existence of one plan until after the death of the participant. Thus, the court permitted her to obtain a QDRO after such death.⁴¹⁶ The court, however, based its conclusion that there was no violation of the Actuarial Increase Prohibition completely on its finding that there was no violation of the distinct prohibition on QDROs providing benefits not otherwise provided by the plan.⁴¹⁷ The court did not discuss what the Actuarial Increase Prohibition prevented.⁴¹⁸ By contrast, the court below considered the Actuarial

QDRO for a share of a single life annuity.

412. See, e.g., *Galenski v. Ford Motor Co. Pension Plan*, 421 F. Supp. 2d 1015, 1018 (E.D. Mich. 2006) (stating that “[t]he fact that the parties spent nearly four years putting together a document acceptable to Defendant as they tried to agree on what, in essence, were clerical issues does not serve to obviate the existence of a QDRO that conformed to the requirements of federal law”).

413. It may be argued that the modification increases the costs because, without the modification, the DRO is not a QDRO and thus can cause the plan to be liable for survivor benefits. However, this argument is wrong because, under the same reasoning, a DRO could never be converted to a QDRO even if the modification were completed before the participant's death.

414. *Patton v. Denver Post*, 326 F.3d 1148 (10th Cir. 2003).

415. *Id.* at 1149. The participant's employer responded to a request by the participant and his spouse for a list of the pension plans in which he participated with a list that excluded the pension plan with the most assets.

416. *Id.* The court rejected the plan's incorrect claim that entitlements to survivor benefits must be determined prior to a participant's death and noted there was no rival claimant for the survivor benefits.

417. *Id.* at 1152. The court referred to the fact that the former wife could have selected survivor benefits in the original divorce decree, QDRO. The court presumed that retroactive changes to QDROs raised no issues.

418. *Id.* at 1152 (referring to *Bailey*, 1996 U.S. Dist. LEXIS 231, at *9, in which the court pointed out that there could be no violation of the Actuarial Increase Prohibition if an annuity for one living individual was replaced by an annuity for another living but older individual by a QDRO based on a DRO issued long before the death of the participant). By contrast, in *Patton*, a terminated annuity for a dead person was replaced by an annuity for a living person. This obviously increases the actuarial costs of the plan at the time of such change.

Increase Prohibition but found it inapplicable under the special facts by observing, “*Nunc pro tunc* orders may be entered by a Colorado court to correct an error or omission in court records and are deemed to have retroactive effect.”⁴¹⁹ The court below, however, appears to have made the same argument as is being made in this Article. The postmortem order was acceptable because the alternate payee is not using the knowledge of the death of the participant to select survivor benefits but is rather perfecting the survivor benefit designation that she made prior to the participant’s death.

If the original DRO does not clearly designate the benefit form of payment to which the alternate payee is entitled, the application of the Actuarial Increase Prohibition is less obvious. For example, the DRO may give a spouse a fraction of a participant’s pension but not specify the date payments will begin, the form of payment, or the amount of payments. These omissions would appear to prevent the DRO from being a QDRO.⁴²⁰ Moreover, such a DRO does not clearly establish whether the payee was entitled to any survivor benefits, an annuity over the payee’s life, or a fraction of the participant annuity’s payments. The Actuarial Increase Prohibition prevents alternate payees from retroactively selecting benefit options using the knowledge of the death of one or more persons if that knowledge changes the actuarial values of one or more of the alternate payee’s benefit options.

This goal may be best achieved by minimizing the ability of alternate payees to make retroactive benefit selections. In particular, if benefit options were ambiguous before the perfection of the QDRO, it is advisable to treat the alternate payee as having chosen the ambiguous form with the least actuarial value. There is nothing in the QDRO Provisions or their legislative history that suggests that pension plans should be placed at risk in case of any such ambiguity. The Actuarial Increase Prohibition strongly suggests a contrary conclusion. Moreover, the alternate payee’s counsel may avoid such ambiguity by good drafting.⁴²¹

Nevertheless, Mr. Shulman, a respected QDRO commentator and author of the QDRO Handbook disagrees with the above approach and argues that ERISA permits and should permit

419. *Patton v. Denver Post-Denver Guild Pension Plan*, 179 F. Supp. 2d 1232, 1237 (D. Colo. 2002).

420. ERISA § 206(d)(3)(C)(iii); 29 U.S.C. § 1056(d)(3)(C)(iii) (2000); *see also Stahl*, 212 F. Supp. 2d 657 (rejecting a draft QDRO for not specifying benefit distribution when order gave alternate payee: “50% of total funds in account of annuity plan on specified date”).

421. As with all terms of a marital dissolution or orders enforcing a dissolution order, the participant’s spouse will have to depend for his or her rights from a DRO on the performance of his or her counsel.

postmortem changes to DROs so that former spouses may obtain survivor benefits even if they had not made such a selection before the participant's death:

Are we to believe that the plan suffers a loss when these beneficiaries [the beneficiaries of survivor benefits under the DRO with the postmortem changes who did not have such benefits prior the change] actually receive a plan benefit and that the plan incurs a gain when a beneficiary is denied survivorship benefits? As we argued earlier, companies should not be permitted to put their pension plan in a better funding position on the backs of disenfranchised former spouses who, through no fault of their own, submitted a QDRO that did not meet the technical requirements of the company—at that time. It is unconscionable public policy and totally contrary to the entire spirit of ERISA. There is a painful irony in a company's use of a survivorship right when ERISA and REA[CT] were created to protect those same rights.⁴²²

Mr. Shulman has similarly written that such postmortem changes should be allowed “to secure a former spouse's property rights to a pension that could suddenly disappear as a result of a technicality or a family law attorney's inexperience in drafting QDROs.”⁴²³

ERISA does not permit alternate payees to be deprived of survivor benefits because of technicalities; as discussed, technicalities may be corrected retroactively. Actuarial values are not determined by the experience of any particular individuals but rather by the experiences of populations of large groups of similar individuals. In particular, if pension plans are forced to give any group of individuals, such as all alternate payees, the ability to choose retroactively whether to obtain survivor benefits or other benefits, which are not available to other plan participants, this will increase the actuarial costs of the plan⁴²⁴ and thereby reduce the benefits of the other participants. It is also a questionable policy to permit former spouses, who often have access to professional counsel in making the benefit choices, to reverse their benefit choices in those circumstances, but not provide similar options to spouses who survive participants, and rarely have professional advice with respect to their benefit choices. Moreover, there is often little evidence that such cases result from poor legal

422. QDRO HANDBOOK, *supra* note 314, at 7-27 to 7-28.

423. Gary Shulman, *QDROs—the Ticking Time Bomb*, 23 FAM. ADV. 26 (Spring 2001) (citing the argument of the dissent in *Samaroo*, *supra*, that under the Full Faith and Credit Act federal courts must follow a state court's decision to enter a *nunc pro tunc* order). Mr. Shulman does not explain why the QDRO Provisions were needed if the Full Faith and Credit Act were controlling.

424. As discussed, *supra*, it is irrelevant whether this will increase actuarial costs by more than a *de minimis* amount. Any increase violates the Actuarial Cost Increase Prohibition.

advice rather than the fact that the participant died more quickly than the former spouse expected as in *Sanzo*.

The Circuits have consistently held that QDROs may be entered under certain circumstances after the participant's death.⁴²⁵ If the terms of the QDRO were clearly established to the pension plan before the participant's death alternate payees have been permitted to perfect the QDRO after the participant's death if third parties are not affected by such perfection.⁴²⁶ The QDRO terms may also be established after the participant's death, such as where the plan is discovered by the payee after the death of participant⁴²⁷ or the plan and payee were unaware of the death of the participant while working on the QDRO.⁴²⁸

425. *But see* Shulman, *supra* note 423 (criticizing the Third Circuit's unwillingness to always permit QDRO changes after the death of a participant); Aaron Klein, *Note, Divorce, Death, and Posthumous QDROs: When Is it Too Late for a Divorcee to Claim Pension Benefits Under ERISA?*, 26 CARDOZO L. REV. 1651 (March 2005) (contrasting the Third and Fourth Circuit's unwillingness to permit QDRO changes after the death of a participant with the willingness of the Eighth, Ninth, and Tenth Circuits, although the cited Fourth Circuit case did not concern the time of the participant's death and the cited Third Circuit case was very fact-driven); *see also* Patton, 326 F.3d 1148 (10th Cir. 2003) (the court contrasts its attitude with what it describes inaccurately as the inflexible attitude of the Third Circuit rejecting all postmortem QDROs).

426. *Tise*, 255 F.3d 66 (mother of participant's children was seeking a sum for past due alimony payments from the participant's pension benefits for several years, but the QDRO was not finalized until after participant's death); *Hogan v. Raytheon, Co.*, 302 F.3d 854, 857 (8th Cir. 2002) (decree issued nine months before death and order issued two days after death both spoke of fifty percent of pension benefits, which thus included survivor benefit); *IBM Savings Plan v. Price*, 349 F. Supp. 2d 854, (D. Vt. 2004) (participant died after draft QDRO at employer's request had been presented to employer before it was presented to court, which order was consistent with divorce decree and gave the former spouse a portion of 401(k) plan); *see also* *Files*, 428 F.3d 478. A divorce judgment presented to pension plan before the participant's death by a former spouse was held to be a QDRO entitling the spouse to an immediate one-half interest in participant's benefits. The judgment was held to be a QDRO. *See id.* at 491 (stating in dicta that a QDRO may be presented at any time including after the death of the participant). The court did not discuss whether the separate interest of the divorce judgment was a benefit available from the plan.

427. *Patton*, 326 F.3d 1148. The divorce judgment provided one half of the survivor benefits of employer's pension plan to the former spouse. *Nunc pro tunc* order did the same with an inadvertently omitted plan when it was clear this was intention of parties. However, the court held the QDRO did not increase benefits by presuming that the QDRO was valid rather than by asking if the plan would have owed any survivor benefits if the order had not been recognized.

428. *See* *Nat'l City Corp. Non-Contributory Ret. Plan v. Ferrell*, No. 1:03CV259, 2005 U.S. Dist. LEXIS 36149 (N.D. W. Va. Aug. 31, 2005). The court stressed that the *nunc pro tunc* order did not change substance, but only entered an order previously approved that all benefits go to former spouse. *See also* *Galenski*, 421 F. Supp. 2d 1015. The court observed that the parties

One district court, however, permitted a *nunc pro tunc* modification of a QDRO after the participant's death on the questionable basis that the original divorce judgment was ambiguous. In *Payne v. GM/UAW Pension Plan*,⁴²⁹ the judgment provided the alternate payee with "[forty-five percent] of participant's [annuity] pension" whereas the original QDRO restricted her to forty-five percent of the monthly pension payments and contained an explicit statement she was entitled to "no" survivor benefits.⁴³⁰ Moreover, the participant had insisted throughout the twenty month divorce proceeding that his former spouse would be entitled to no survivor benefits. The modified QDRO which the court accepted deleted the word "no" from the original QDRO and provided her with full survivor benefits not merely forty-five percent of the survivor benefits.⁴³¹

The *Payne* court also stated that the outcome may have changed if the participant who had remarried the day of the divorce had died a year rather than a month after the new marriage so his new wife could claim the spousal survivor benefits. A similar observation about the possible ineffectiveness of a postmortem change on "another vested party" appeared in *Patton*.⁴³² In fact in *Kazel v. Kazel*,⁴³³ such postmortem retroactive change was not permitted when the participant's widow would have been adversely affected by such change. In particular,⁴³⁴ a

had been working on perfecting the "clerical elements" of a QDRO for several years addressing unpaid child support obligations.

429. No. 95-CV-73554-DT, 1996 U.S. Dist. LEXIS 7966 (E.D. Mich. May 7, 1996). The decision also discusses a number of decisions where QDROs were not allowed to be modified after the death of the participant.

430. See also *Files*, 428 F.3d 478 (focusing on a dispute about the significance of an alternate payee's entitlement to "one-half of the Exxon pension" in the original divorce). Did this give the payee half the payments the participant was entitled to, namely during this lifetime, or an interest in half of the participant's pension benefits which she could obtain over her lifetime? There was no distinct QDRO taking a position on this until after the participant's death. *Id.*

431. There was no discussion of why she was entitled to more than forty-five percent of the survivor benefits. The smaller portion would appear to be more consistent with the terms of the original judgment and the participant's firmly expressed reluctance to provide the alternate payee with any survivor benefits during the divorce proceedings.

432. *Patton*, 326 F.3d at 1153.

433. 819 N.E.2d 1036 (N.Y. Ct. App. 2004) in which the court denied a *nunc pro tunc* order to modify a QDRO to provide a former spouse with survivor benefits in addition to a fraction of the "monthly allowance" from the pension plan. The court referred to (A) the failure of the original QDRO to distinguish between retirement benefits and survivor benefits; (B) the lack of dissonance between the divorce judgment and the original QDRO; and (C) the fact that in the ten years since the divorce the participant had acquired a wife who was otherwise entitled to the plan's survivor benefits.

434. *Id.* at 1037.

former spouse can overcome the right of an actually surviving spouse to receive a survivor annuity only if specifically awarded such benefits by the matrimonial court. The difficulty as discussed in the following section is not the Actuarial Cost Increase Prohibition but rather the ability of the alternate payee to adversely affect a plan interest which is not subject to the participant's control because the interest has vested in another person.

E. The Applicability of the ERISA Marital Dissolution Beneficiary Designation to Survivor Benefits

The QDRO Provisions permit a former spouse of a participant to continue to be treated in a QDRO as a surviving spouse of the participant after a divorce for purposes of ERISA § 205, 29 U.S.C. § 1055.⁴³⁵ The former spouse under this statute will then remain entitled to pre-retirement survivor benefits and also a post-retirement survivor benefits for a plan subject to the QJSA rules. Moreover, such designations will prevent any future spouse from becoming entitled to any survivor benefit under the Spousal Survivor Provisions even one associated with the reduced life annuity that the participant may retain under the QDRO.⁴³⁶

The QDRO Provisions permit a former spouse to obtain the QDRO pertaining to a surviving spouse benefit only if this is done before a new spouse becomes entitled to the survivor benefits under the Spousal Survivor Provisions. This entitlement is generally established before either the participant or the spouse begins to receive plan benefits. The Fourth Circuit, however, in *Hopkins v. AT&T Global Information*,⁴³⁷ issued a more limited

435. ERISA § 206(d)(3)(F); 29 U.S.C. § 1056(d)(3)(F) (2000). This includes meeting the permissible plan requirement of being married for one year.

436. *Id.*; see also D.O.L. QDRO GUIDE, *supra* note 320, Q 3-5, at 33-36 (stating that the reduction in the participant's normal retirement benefit of a single life annuity reflects the value of the survivor annuity provided to the alternate payee). However, if the QDRO provides the former spouse with only a fraction of the spousal survivor benefits, it appears that successive spouses may obtain benefits under the Surviving Spouse Provisions to the extent the QDRO does not apply to the surviving spouse benefits. *Id.*

437. 105 F.3d 153 (4th Cir. 1997). The QDRO arose during the second marriage because the former spouse obtained a QDRO to collect unpaid alimony benefits from the pension payments which the participant was then receiving. Similarly, former spouses were also not permitted to obtain surviving spouse benefits under QDROs prepared after later spouses were receiving survivor benefits. See also *Rivers v. Cent. & Sw. Corp.*, 186 F.2d 681 (5th Cir. 1999) (applying *Hopkins* to reject an asserted QDRO claim by a former spouse for surviving spouse benefits in 1997 ten years after the death of the participant. As in *Bailey*, the basis of the claim for half of the surviving spouse benefits was her alleged community property interests in the pension which the 1972 divorce had not addressed); *Stahl*, 212 F. Supp. 2d 657 (applying *Hopkins* to prevent a former spouse from becoming entitled to

holding that a QDRO may designate a former spouse as the surviving spouse of a participant even after the participant has a new spouse. Under the court's holding the former spouse may displace the new spouse as long as the designation is made before the participant begins to receive his or her QJSA. However, in this case the DRO was rejected because the participant had begun to receive his QJSA. The court asserted that QDROs may not govern benefits "vested in" persons other than the participant because the participant may not affect the disposition of those benefits and thus those benefits are not "payable with respect to a participant."⁴³⁸ The court then asserted that the survivor benefits vest when the QJSA begins to be paid because REACT removed the original ERISA survivor benefit requirement that (A) a spouse be married to the participant at the time of the participant's death as well as (B) surviving the participant to whom he or she had been married when the participant began to be paid the pension benefits.⁴³⁹

The *Hopkins* court's vesting argument, however, may be extended to prevent any former spouse from using a QDRO to displace a new spouse who is qualified to receive the statutory survivor benefits for spouses. Vesting occurs before the participant begins to receive the QJSA benefits. A spouse's survivor benefits vest immediately because REACT removed the ability of a participant to make an effective unilateral designation of another person to obtain those benefits.⁴⁴⁰

By contrast, an alternate payee may generally displace non-spouses of their beneficiary status before the participant begins to receive annuity benefits, because the participant may unilaterally divest such individuals of their status.⁴⁴¹ However, an alternate payee may not obtain a QDRO to displace an individual who qualifies for non-statutory survivor benefits after the participant begins to receive his benefits, which is when those benefits become

surviving spouse benefits under a QDRO, when such provision was not in the QDROs drafted before the participant's death).

438. *Hopkins*, 105 F.3d at 156-57; see also *Walsh v. Woods*, 638 S.E.2d 85 (S.C. Ct. App. 2006) (the survivor interest obtained by a spouse when a participant receiving a QJSA was considered her pension benefits). Thus, when a divorce decree awarded each party his or her pension benefits, the then spouse was thereby entitled to those survivor benefits. Moreover, a QDRO could not permit the participant's second spouse to obtain those survivor benefits from the first spouse because those benefits are not payable with respect to the participant, and thus, not subject to a QDRO in favor of the second spouse.

439. See 26 C.F.R. § 1.401(a)-11(d)(3)(i), (ii), (iii) (1977) (providing pre-REACT spousal survivor requirements).

440. A one-year marriage requirement may be imposed by the plan. ERISA § 205(f); 29 U.S.C. § 1055(f) (2000).

441. The one exception is a non-spouse who is an alternate payee under an earlier QDRO which would have thereby vested the non-spouse's benefits.

vested.⁴⁴² Again, such benefits will thereby no longer be “payable with respect to a participant.” Thus, the statutory beneficiary designation in the QDRO Provisions,⁴⁴³ may not be used to obtain the vested benefits of the non-participant.

F. Plan Procedures for Determining Whether a DRO Is a QDRO and the Effective Date of an ERISA Marital Dissolution Beneficiary Designation

The effective date of the benefit designation in a QDRO may precede the date the QDRO is submitted to the pension plan. The QDRO Provisions do not contain any time limit on the submission to the pension plan of the DRO, the draft QDRO or the final QDRO that constitutes the benefit designation.⁴⁴⁴ More generally, the ERISA prohibition on the forfeiture of vested pension benefits⁴⁴⁵ prevents plans from imposing any time limit on the submission of benefit claims by participants and beneficiaries pursuant to the terms of a pension plan.⁴⁴⁶ Thus, a classical DB pension plan, that is, one which provides participants with single life annuities unless they are married in which case a single joint and survivor annuity is provided, would be liable to the participant's surviving spouse for survivor benefits from the date of the death of a participant. The participant's surviving spouse may make a claim at the time of the participant's death or at any time after the participant's death. Similarly, a former spouse who retained the spousal survivor benefit designation by means of a QDRO could submit his or her benefit claim to the plan at any time, except as discussed in the next section. Moreover, the Ninth Circuit held that a DRO, which may be modified to become a QDRO, may not be defeated by a bankruptcy filing by the participant before the conversion of the DRO into a QDRO or even before the filing of a QDRO request with the pension plan.⁴⁴⁷

442. *In re Marriage of Norfleet*, 612 N.E.2d 939 (1993).

443. ERISA § 206(d)(3)(D)(iii); 29 U.S.C. § 1056(d)(3)(D)(iii) (2000).

444. In fact, Section 1001(1)(B) of the PPA provides that a DRO shall not fail to be a QDRO solely because of the time at which it is issued and the Secretary of Labor is directed to issue regulations explaining the provision on or before August 17, 2007. This provision was described in the Senate Finance Committee report that accompanied a precursor to the PPA, *National Employee Savings and Trust Equity Guarantee Act Report*, 109 S. REP. NO. 174, November 2, 2005. In particular, Section 702 of the precursor was described as being directed at clarifying that post-divorce orders may be QDROs.

445. ERISA § 203(a); 29 U.S.C. § 1053(a) (2000).

446. By contrast, welfare plans such as health care insurance plans can and often do impose limits on when claims may be filed.

447. *Gendreau v. Gendreau*, 122 F.3d 815 (9th Cir. 1997) (DRO giving alternate payee an interest in the pension plan which becomes enforceable when converted into a QDRO, and thus, that pension interest is not part of the participant's bankruptcy estate). *But see King v. King*, 214 B.R. 69 (D. Conn.

The QDRO Provisions explicitly provide that the benefit designation of a QDRO may be retroactive with respect to a pension plan to the date that a draft QDRO is presented to the plan.⁴⁴⁸ Plan administrators must sequester benefit payments that are subject to a DRO for up to eighteen months while a determination is being made whether a DRO “or modification thereof” is a QDRO.⁴⁴⁹ During the sequestration period the QDRO may be modified in response to comments and suggestions by the pension plan administrator who may thus make several determinations during the eighteen-month period.⁴⁵⁰ The Ninth Circuit stated in *Tise*⁴⁵¹ that the “evident purpose of the [eighteen]-month period was to provide a time in which any defect in the original DRO could be cured.” If the determination is made within eighteen months of the date the first payment is required to be made under the DRO, the administrator shall pay the person or persons who are entitled to the segregated amounts such amounts (including interest).⁴⁵² If the determination is not made within the eighteen months, at the end of the eighteen months, the segregated amounts are paid to the person or persons who would have been entitled to the amounts if the DRO were determined not to be a QDRO.⁴⁵³ A determination that is made after the eighteen-month period only applies prospectively,⁴⁵⁴ thus the plan administrator could then make payments to a person or persons who would have been entitled to the amounts if the DRO were determined not to be a QDRO until a contrary determination is made.⁴⁵⁵ Moreover, the DOL has provided that a DRO received after the date that the first payment is due under the DRO is not effective against the plan starting for any payments prior to the submission of the DRO.⁴⁵⁶

1997) (Anti-Alienation Prohibition preventing a DRO from having any effect until it becomes a QDRO).

448. ERISA § 206(d)(3)(H); 29 U.S.C. § 1056(d)(3)(H) (2000).

449. *Id.*

450. D.O.L. QDRO GUIDE, *supra* note 320, Q 2-14, at 20-21. These changes may be expected to focus on the description and timing of the alternate payee’s benefits because there would appear to be no reason why more than one change should be needed to identify the parties and the pension plan.

451. *Tise*, 255 F.3d at 670. In such case, the court held that the QDRO would prevent the participant from designating a beneficiary other than the alternate payee during the time between the submission of the initial DRO and its revision to a QDRO.

452. ERISA § 206(d)(3)(H)(i), (ii); 29 U.S.C. §§ 1056(d)(3)(H)(i), (ii) (2000).

453. ERISA § 206(d)(3)(H)(ii); 29 U.S.C. §§ 1056(d)(3)(H)(ii).

454. ERISA §§ 206(d)(3)(H)(iv); 29 U.S.C. §§ 1056(d)(3)(H)(iv).

455. D.O.L. QDRO GUIDE, *supra* note 320, Q 2-13, at 20-21.

456. *Id.* The DOL did not discuss whether the QDRO gives the alternate payee the right to recover from a party other than the plan the benefits paid prior to the submission of the initial DRO.

The QDRO Provisions require plans to establish written procedures for determining within a reasonable period of time whether a DRO is a QDRO.⁴⁵⁷ Under these procedures, the plan must promptly notify the participant and each alternate payee named in a proposed QDRO of the receipt of such document and provide a copy of the plan's QDRO determination procedures.⁴⁵⁸ The DOL has stated that a defined contribution plan may charge participants or potential payees for the reasonable expenses for processing a QDRO application.⁴⁵⁹ At least three circuits have held that review of plan determinations of QDRO determinations is *de novo* because such decisions are matters of statutory rather than plan interpretation.⁴⁶⁰ Thus, it is not surprising that four other circuits have permitted administrators to interplead without first making an initial decision on the validity of a QDRO.⁴⁶¹ Moreover,

457. ERISA § 206(d)(3)(G); 29 U.S.C. § 1056(d)(3)(G). These procedures are distinct from the benefit claims procedures set forth in ERISA § 503; 29 U.S.C. § 1133. See Statement accompanying release of claims regulations, 65 Fed. Reg. 70, 245, 255, n.39 (Nov. 21, 2000). Once the QDRO is validated, an alternate payee has the same access to the benefit claims procedure as any other beneficiary, if he or she believes he or she has not received her benefit entitlement or wishes to determine his or her benefit entitlement. ERISA § 502(a)(1)(B); 29 U.S.C. § 1132(a)(1)(B) (2000). Benefit claims under a terminated plan, however, would be sought under (a) ERISA 4070(a), 29 U.S.C. § 1370(a) (2000) for a single-employer plan; or (b) ERISA 4301(a), 29 U.S.C. § 1451(a) (2000) for a multi-employer plan.

458. D.O.L. QDRO GUIDE, *supra* note 320, Q 2-2, at 13.

459. *Id.* Q 2-6, at 16; D.O.L. ERRATA SHEET. In Employee Benefits Security Administration Field Assistance Bulletin 2003-3, the D.O.L. Advisory Opinion 94-32A (which prohibited such charges) was superseded, and the DOL permitted a defined contribution plan to charge a participant or beneficiary the reasonable costs of reviewing a QDRO. See also QUESTIONS AND PROPOSED ANSWERS FOR THE DEPARTMENT OF LABOR STAFF FOR THE 2006 ABA JOINT COMMITTEE OF EMPLOYEE BENEFITS TECHNICAL SESSION Q & A 5 (May 3, 2006) (similar principles may apply to defined benefit plans but there is little guidance on determination of reasonable costs).

460. *Dial v. NFL Player Supp. Disability Plan*, 174 F.3d 606, 611 (5th Cir. 1999) (finding that a former spouse had a QDRO which entitled her to a collectively bargained increase in pension benefits); *Hogan*, 302 F.3d 854 (holding that a QDRO completed after death participant's death was valid); *Files*, 428 F.3d 478 (finding a QDRO completed after death participant's death was valid).

461. *Metro. Life Ins. Co. v. Bigelow*, 283 F.3d 436 (2d Cir. 2002) (holding that the order was a DRO and had sufficient specificity to be QDRO); *Metro. Life Ins. Co. v. Marsh*, 119 F.3d 415 (6th Cir. 1997) (finding that an order had sufficient specificity to be QDRO); *Metro. Life Ins. v. Wheaton*, 42 F.3d 1080 (7th Cir. 1994) (finding that an order had sufficient specificity to be QDRO). Each of these courts assumed QDROs applied to life insurance plans despite the restriction of QDROs to pension plans. See also *Tise*, 255 F.3d 661 (QDRO could be perfected after participant's death); *Aetna Life Ins. Co. v. Bayona*, 223 F.3d 1030 (9th Cir. 2000) (discussing the legal basis under ERISA for interpleader).

the Third Circuit concluded in *Metropolitan Life v. Price*⁴⁶² that such interpleader is consistent with the exhaustion principles that generally require claimants to complete the claims process before being permitted to obtain access to the federal courts. On the other hand, in the one case where the plan sought attorney fees, the court provided only a small part of the fees requested because most of the requested fees were attributable to the plan litigating “vigorously” against one of the claimants.⁴⁶³ The court did not mention the applicability of the DOL position at such time that parties not be charged for an internal review of a QDRO,⁴⁶⁴ although the court applied the same principles by emphasizing that compensable interpleader fees are generally modest so that the fee award will not deplete the disputed fund.⁴⁶⁵ Prudent plan fiduciaries in at least the three circuits with *de novo* review may thus be well advised to interplead and thereby avoid incurring the unreimbursable expense of a review of an alleged QDRO if it appears that the participant and the alternate payee will vigorously litigate the validity of the QDRO.⁴⁶⁶ This practice would reduce the plan’s administrative expenses without harming the parties because the inevitable court review of the QDRO’s validity will be *de novo*⁴⁶⁷ and the review will occur more quickly. On the other hand, for DB plans the applicability of the interpleader procedure is unclear because benefits are often not distributable as simple lump sums, thus they are much more difficult to deposit with the court.⁴⁶⁸

462. 2007 U.S. App. LEXIS 21076 (3d Cir., Sept. 4, 2007). The court vacated a contrary decision by the court below that denied interpleader. The underlying dispute pertained to whether the participant’s designee and surviving spouse was entitled to life insurance proceeds when the participant was obligated under a divorce decree to name the children of the participant’s prior spouse.

463. *Tise*, 255 F.3d at 675-78.

464. At such time, D.O.L. Advisory Opinion 94-32A prohibiting such charges was still in effect.

465. *Id.*

466. *But see* QUESTIONS AND PROPOSED ANSWERS FOR THE DEPARTMENT OF LABOR STAFF FOR THE 2006 ABA JOINT COMMITTEE OF EMPLOYEE BENEFITS TECHNICAL SESSION Q & A 22 (May 3, 2006) (suspending claims processing when there is a dispute between claimants does not appear consistent with plan fiduciary’s duty to act in interest of participants and beneficiaries pursuant to plan documents, although it may be prudent to interplead to protect the plan from liability in the event a court reverses the plan decision).

467. It could, however, be argued that even in cases of *de novo* review courts may benefit from the analysis of a lower court.

468. However, theoretically successive payments may be deposited with the court.

G. How a Pension Plan May Avoid Having to Follow an ERISA Marital Dissolution Benefit Designation and How a Statutory Designee May then Collect All His or Her Plan Benefits

ERISA discharges a plan of its obligation to the participant or any alternate payee if it acts "in accordance with part [four] of this subtitle [the fiduciary responsibility sections of ERISA] in "treating a DRO as being a QDRO or taking action pursuant to the segregation procedures."⁴⁶⁹ If a plan fails to sequester plan benefits during the statutory eighteen-month sequestration period, it may be forced to pay benefits twice.⁴⁷⁰

This exception does not affect a classical DB pension plan which has not paid any survivor benefits with respect to a participant who died with vested benefits. In such case, the plan need have no concern about paying more than one person because it has paid no persons. Thus, the pension plan would be liable for survivor benefits provided by a QDRO from the date of the death of the participant. It would be irrelevant whether the QDRO is presented before the participant died or at any time after such death.⁴⁷¹

The statute provides that a pension plan may not be discharged by simply following the segregation procedures described, but it is unclear what additional fiduciary duties must be fulfilled since there appears to have been no litigation on this point. It is advisable to consider two duties. First is disclosure. To what extent, does the plan have an affirmative duty to provide any information, and if so, to provide the information in an understandable form? Do these obligations differ depending on

469. ERISA § 206(d)(3)(I); 29 U.S.C. § 1056(d)(3)(I); *see also* Jayne E. Zangelein & Susan J. Stabile, *ERISA LITIGATION* 898-900 (2d. ed. 2005).

470. *See, e.g.*, *N. Am. Coal Corp. v. Roth*, 395 F.3d 916 (8th Cir. 2005), *rehearing en banc denied*, No. 04-2213, 2005 U.S. App. LEXIS 4531 (8th Cir. Mar. 18, 2005), *cert. denied*, No. 04-10618, 2005 U.S. LEXIS 7050 (Oct. 3, 2005) (using ERISA § 502(a)(3), 29 U.S.C. § 1132(c)(3) to try to recover benefits it had failed to sequester, but had inadvertently paid out to the wrong party: the participant). The plan was not permitted to seek restitution from the participant but was able to impose a constructive trust on the funds which the participant had transferred to another party who had deposited the funds in a credit union. The traditional tracing and *res* principles of constructive trusts were applied, but the court did not consider whether the plan document had any provisions for recovering overpayments. *Id.*

471. This analysis was presented in *Patton v. Denver Post*, 326 F.3d 1148, 1151 (10th Cir. 2003) (surviving spouse presented a QDRO for survivor benefits after the death of the participant in a classical DB plan, which the plan's fiduciaries had not thought any one was eligible for the surviving spouse annuity benefits). *But see* Comment Letter of American Benefits Council 2 (May 7, 2007), *available at* <http://www.dol.gov/ebsa/pdf/Jacobson050707.pdf> (pertaining to Interim Rule Relating to Time and Order of Issuance of Domestic Relations Orders and argues to the contrary on policy rather than legal grounds).

whether the potential alternate payee is or is not a plan beneficiary at the time of the initial submission, such as the current spouse with surviving spouse benefits? Second, is the processing of the QDRO request. To what extent, if any, do plan fiduciaries have a duty to assist potential alternate payees prepare QDROs, such as providing a sample QDRO?⁴⁷² How do reasonable QDRO review procedures compare with reasonable claims review procedures? The latter have explicit deadlines and standards for claims denials set by Department of Labor regulations,⁴⁷³ but there are no regulations setting forth any QDRO procedure rules.⁴⁷⁴

There is no clear set of guidelines describing how a pension plan fiduciary should react upon learning of a possible divorce or separation agreement pertaining to a participant. If information is being sought by a spouse about preparing a potential QDRO, the DOL advises plans to provide plan information to help prepare a QDRO.⁴⁷⁵ Spouses often approach plans for assistance in drafting an initial DRO which the plan will accept as a QDRO. At such time, a plan fiduciary would be obligated to permit a participant to withdraw plan benefits if no spousal consent is required for such withdrawal, such as for a DC plan not subject to the ERISA funding requirements, even though such withdrawal may make any subsequently obtained QDRO moot. The fiduciaries would appear to be able to rely on the principle that fiduciaries may not be held responsible for distributing benefits prior to having any notice of a DRO, which may give rise to the QDRO and, which in turn, may not have an earlier effective date than the date of the DRO as far as the plan's liability is concerned.⁴⁷⁶

A spouse would be well-advised to approach a pension plan with a DRO if the participant may otherwise withdraw pension funds without the spouse's consent, while the QDRO is being prepared. Such withdrawals may occur with a profit-sharing plan if a DRO has not been submitted to start the statutory segregation period.⁴⁷⁷ Furthermore, if a spouse has identified the pension plan but is uncertain about what share, if any, the spouse will obtain in

472. To what extent do the generic samples in the D.O.L. QDRO Guide, the IRS QDRO Guide, or the PBGC Guide suffice?

473. 29 C.F.R. § 2560.503-1(b)(3). These procedures are distinct from the benefit claims procedures set forth in ERISA § 503; 29 U.S.C. § 1133. See Statement accompanying release of claims regulations. 65 Fed Reg. 70, 245, 70, 255 n.39 (Nov. 21, 2000).

474. See Comment Letter, *supra* note 471 (pertaining to Interim Rule Relating to Time and Order of Issuance of Domestic Relations Order and suggests that it is advisable to issue such regulations).

475. D.O.L. QDRO GUIDE, *supra* note 320, Q 2-1, at 12-13, Q 2-7, at 16. Some plans, however, take the position that no information need be provided or funds need be segregated until the claimant has obtained a DRO.

476. D.O.L. QDRO GUIDE, *supra* note 320, Q 2-13, at 20-21.

477. See also QDRO HANDBOOK, *supra* note 314, at 10-6.

the participant's pension, the spouse may be well advised to seek a temporary order from the court responsible for marital dissolutions to prevent the plan from paying out the pension plan benefits pending the qualification of the QDROs.⁴⁷⁸ Such an order would be a DRO because it presumably is (A) issued pursuant to a domestic relations order, and (B) pertains to the provision of child support, alimony payments or marital property rights.⁴⁷⁹ It is not a QDRO because it does not specify the payments or the manner to determine the payments to an alternate payee.⁴⁸⁰ Thus, it would appear to trigger the eighteen-month segregation period during which benefit payments would be suspended and the order may be modified to qualify as a QDRO.⁴⁸¹ Prudent fiduciaries concerned about paying the benefits twice would thus segregate the benefits.

There is even more ambiguity about the proper behavior of a fiduciary of an ERISA pension plan who receives information about a possible DRO from another person, such as (A) a participant who wishes to designate a person other than his or her apparent spouse to receive survivor benefits as discussed with respect to the Spousal Protection Provisions, or (B) a notice to the medical plan sponsored by the same employer that family coverage is no longer required because of a marital dissolution. The employer in *Files v. ExxonMobil Pension Plan*⁴⁸² seemed to take the position that an eighteen-month hold is placed on the distribution of the participant's plan assets until the divorce decree or a QDRO is provided. In that case, it was not clear what further action, if any, the plan fiduciaries take after receiving the divorce decree or QDRO. As discussed in the earlier section pertaining to the Spousal Survivor Provisions, this Article suggests a similar but less extensive procedure when a plan is presented with news of a marital dissolution or a proposed QDRO but is not provided with a DRO by the proposed alternate payee. It would appear advisable for a cautious fiduciary to sequester pension plan assets for a brief period of time, such as thirty days, while the spouse has the opportunity to show that the alleged DRO was not issued, has been superseded or provides the spouse with plan rights obtained under the divorce or separation.⁴⁸³ Again, the paucity of litigation

478. See, e.g., QDROs & FAMILY LAW, *supra* note 314, at 28-29 (providing examples of provisions in DROs to protect pension plan benefits during such consideration, such as limitations on the ability to borrow funds from the participant's plan benefits). One may argue that the segregation procedures prevent a borrowing from a participant's pension plan because borrowing is equivalent to a plan withdrawal.

479. ERISA § 206(d)(3)(B)(II); 29 U.S.C. § 1056(d)(3)(B)(II) (2000).

480. ERISA § 206(d)(3)(C)(ii); 29 U.S.C. § 1056(d)(3)(C)(ii) (2000).

481. ERISA § 206(d)(3)(H); 29 U.S.C. § 1056(d)(3)(H) (2000).

482. *Files*, 428 F.3d at 481.

483. Plan fiduciaries may wish to modify the notice to ask about rights other than survivor rights. On the other hand, the plan fiduciary may learn of the

on this point suggests that a prudent fiduciary may not find it necessary to provide the spouse with such notice. It does not appear necessary to sequester plan payments for eighteen months⁴⁸⁴ unless a proposed QDRO is provided by a potential alternate payee, so there are no questions about (A) whether the payee is then prepared to assert his or rights under the DRO, (B) when the plan has the right and responsibility to stop sequestration, and (C) who is to be paid both sequestered funds and post-sequestration payments.

The DOL QDRO Guide states that fiduciaries need not determine the validity of a DRO under state law.⁴⁸⁵ The Fifth and Seventh Circuits found such disputes are to be addressed to the state courts issuing the DROs.⁴⁸⁶ In fact, the Seventh Circuit has stated that “ERISA does not require or even permit a pension fund to look beneath the surface” of a QDRO.⁴⁸⁷ Thus, it would appear that plans must defer to the state courts with respect to an alleged state law deficiency in the DRO, such as whether local law permits DROs to include attorneys’ fees, or the participant understood the order. On the other hand, the DOL QDRO Guide states that state courts lack the jurisdiction to decide if a DRO is a QDRO.⁴⁸⁸ This position is not shared by many state courts, which, as discussed within this Article, prefer to resolve all issues pertaining to a marital dissolution agreement. Moreover, if a state court issues a *nunc pro tunc* DRO there is a separate and distinct question whether the DRO is a QDRO.

Plan fiduciaries, however, are responsible for determining whether the order that has been upheld by state courts is a DRO, and if so whether the DRO meets the QDRO standards. It would appear those plan fiduciaries must review such claims with the same care that they are required to apply to any benefit claim by a

dissolution in a non-plan fiduciary role, such as when the participant changes medical benefit coverage to reflect a change in marital status. However, unless the participant is receiving pension payments or changing beneficiaries, the plan is not in danger of paying the wrong person any plan benefits. Thus, many plans may decide not to give notice until the participant seeks payment or to change beneficiaries, which is often the motivation for the participant informing the plan of the marital dissolution or separation agreement.

484. ERISA § 206(d)(3)(H); 2 U.S.C. § 1056(d)(3)(H) (2000).

485. D.O.L. QDRO GUIDE, *supra* note 320, at 16-17.

486. *Blue v. UAL Corp.*, 160 F.3d 383 (7th Cir. 1998); *Matassarini v. Lynch*, 174 F.3d 549 (5th Cir. 1999) (challenging the substantive provisions of the QDROs, but the courts found that ERISA allocated such challenges to the state courts); *see also* *Marker v. Northrop Grumman Space & Missions Sys. Pension Plan*, No. 04 C 7933, 2006 U.S. Dist. LEXIS 75507 (N.D. Ill. Oct. 4, 2006) (it is irrelevant that DRO is not consistent with the agreement of marital dissolution because the plan may only look at face of DRO).

487. *Blue*, 160 F.3d at 385.

488. D.O.L. QDRO Guide, *supra* note 320, Q 1-12, at 9.

participant or beneficiary. On the other hand, as discussed previously in this Article, plan fiduciaries may instead interplead, so that the parties may resolve their dispute before a court without any further plan participation or expenditure of plan resources.

Participants will continue to be entitled to plan benefits even if the plan is discharged. The participant and any person who may have received the pension benefits to which an alternate payee was entitled may have an obligation to the alternate payee⁴⁸⁹ in the same manner as a person who wrongfully obtained a surviving spouse's benefits. Such a situation is most likely to arise, when (A) the participant acts contrary to the terms of the QDRO and withdraws a considerable sum before the DRO is submitted by the payee;⁴⁹⁰ (B) an alternate payee does not submit the QDRO to the plan before benefits were distributed because the alternate payee was not aware of the participant's plan benefits;⁴⁹¹ (C) the QDRO determination that the DRO is a QDRO takes more than eighteen months to resolve and the plan distributes the funds in question as though the QDRO were not effective as directed by ERISA;⁴⁹² or (D) the alternate payee did not quickly file a QDRO that was issued considerably before the date the pension benefits first become payable.⁴⁹³ There is sometimes no apparent reason why a participant did not immediately seek to establish a right to payments to which they asserted an immediate right. For example, a former spouse was found to have such a right at the time of her July 18, 1998 divorce, but didn't seek any annuity or lump sum plan benefits until three days after the February 21, 2001 death of the participant.⁴⁹⁴

489. See S. REP. NO. 98-575, 98th Cong. 2d. Sess., *reprinted in* 1984 U.S.C.C.A.N. 2568 (state law causes of action may exist if a plan pays the participants benefits to which an alternate payee is entitled under a QDRO); see also ERISA § 502(a)(1)(B); 29 U.S.C. § 1132(a)(1)(B) (2000) (general provision for benefit claims), ERISA § 502(a)(3); 29 U.S.C. § 1132(a)(3) (2000) (general provision for ERISA relief when other provisions are not available); Comment Letter of New York City Bar Association (May 7, 2007) 3, 11, 13, available at <http://www.dol.gov/ebsa/pdf/Glover050707.pdf> (pertaining to the Interim Rule Relating to Time and Order of Issuance of Domestic Relations Orders, and suggesting that it is advisable for the DOL clarify the rights of alternate payees who do not have the right to recover benefits from a pension plan).

490. There is no requirement of spousal consent for a withdrawal from a DC plan not subject to the funding rules, such as a profit-sharing plan.

491. See, e.g., *Patton*, 326 F.3d 1148 (inadvertently omitting a plan which made no distribution to another party).

492. ERISA § 206(d)(3)(H); 2 U.S.C. § 1056(d)(3)(H) (2000).

493. See, e.g., *Bailey*, 100 F.3d 28 (few benefits may, however, have been lost by the alternate payee when more than twenty-five years passed between the divorce and the date pension payments began).

494. *Files*, 428 F.3d at 480-82.

There appears to be only one case in which an alternate payee sought to recover her benefits directly from the participant who improperly received benefits which the QDRO allocated to her, *Hemphill v. Estate of James J. Ryskamp, Jr.*⁴⁹⁵ Like the only case in which a surviving spouse sought to recover spousal benefits from the participant who improperly received those benefits, *Kopec*,⁴⁹⁶ discussed within this Article, *supra*, there seemed to be little question that if the plaintiff's allegations were upheld the participant, who was again a plan fiduciary, would have breached his fiduciary duties by withdrawing the alternate payee's benefits. The results differed slightly. In both cases, a traditional ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) benefit claim against the plan was permitted.⁴⁹⁷ In *Kopec* the Court dismissed the benefits claim against the participant in his individual capacity.⁴⁹⁸ By contrast, in *Hemphill*, the plaintiff did not make such a claim. In both cases, breaches of fiduciary claims against the fiduciary were permitted to go forward. In *Kopec*, the participant could be personally liable and the alternate payee was held to have no direct claim on the withdrawn funds which could be traced to the participant's IRA, although the participant could be found personally liable.⁴⁹⁹ By contrast, in *Hemphill*, the plaintiff was permitted to go forward with a constructive trust argument against traced funds.⁵⁰⁰

VII. THE SUPREME COURT CONSISTENTLY HOLDS BENEFICIARY DESIGNATIONS THAT SATISFY FEDERAL STATUTORY REQUIREMENTS PREEMPT CONTRARY STATE LAWS

In each decade starting with the 1950s before and after the 1974 enactment of ERISA, the Supreme Court has consistently held that survivor benefits must be paid in accord with those decedents' designations. Designations must satisfy the terms of employee benefit plans subject to federal regulation, or, in the case of a federal savings bond, in accord with the designated ownership

495. No. CV-F-05-1319 OWW/SMS, 2006 U.S. Dist. LEXIS 47929 (E.D. Cal. July 5, 2006). *But see* Nat'l City Corp. Non-Contributory Ret. Plan v. Ferrell, No. 1:03CV259, 2005 U.S. Dist. LEXIS 36149, at *24 n.5 (N.D. W. Va. Aug. 31, 2005) (stating without any explanation that "[s]imilarly, had the Plan previously made payments to Forrest's children [the plan's default designees], Barbara's right to those payments would be unenforceable even though she had a legally enforceable interest in them [under a DRO] prior to Forrest's death").

496. 70 F. Supp. 2d 217 (E.D.N.Y. 1999).

497. *Hemphill*, 2006 U.S. Dist. LEXIS 47929, at *20-47; *Kopec*, 70 F. Supp. 2d at 221.

498. *Kopec*, 70 F. Supp. 2d at 220.

499. *Id.* at 219.

500. *Hemphill*, 2006 U.S. Dist. LEXIS 47929, at *52-58.

title of the bond. As in *Guidry*,⁵⁰¹ and *Shumate*,⁵⁰² which applied to the Anti-Alienation Prohibition, the Supreme Court is reluctant to find that legal requirements about benefit payments, such as the Plan Benefit Terms Mandate, have implicit exceptions. Moreover, the Supreme Court in each case rejected both direct claims to the payor for the survivor benefits,⁵⁰³ and indirect claims to the recipients for the amount of the benefits they received.⁵⁰⁴

The Supreme Court first decided in 1950 in *Wissner v. Wissner*⁵⁰⁵ that a soldier's parents and designated beneficiaries were entitled to receive and retain all the proceeds from a life insurance policy under the National Service Life Insurance Act of 1940, rather than his widow from whom he was estranged throughout his military service even though he used community property to pay the policy premiums. The court declared:

The controlling section of the Act provides that the insured "shall have the right to designate the beneficiary or beneficiaries of the insurance [within a designated class] . . . and shall . . . at all times have the right to change the beneficiary or beneficiaries . . ." 38 U.S.C. § 802(g). Thus Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other.⁵⁰⁶

The cited statutory provision is similar to the ERISA provision upon which the Plan Benefit Terms Mandate rests.

The three dissenters argued⁵⁰⁷ that there was an implicit exception to such mandate in the eight community property states. In such states, they asserted that the soldier may only decide upon the disposition of his half of the insurance policy if the premiums were paid with the compensation earned by the soldier during the marriage, as occurred in this case. This results from the community property presumption that spouses have equal ownership rights to the compensation earned by either during the

501. *Guidry*, 493 U.S. at 375-76.

502. *Shumate*, 504 U.S. at 764.

503. The payor was either an employee benefit plan (which may be the insurer selected by the employer) or the Treasury Department for savings bonds. However, in *Boggs*, 520 U.S. 833 (1997), the claimants did not challenge the decision below that they had no right for benefits from the pension plan.

504. The savings bond case alluded to an exception in a case of fraud or breach of trust in the original purchase rather than the original designation. See *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964) (individual used community property to purchase a savings bond that was registered as owned jointly by the individual and his brother). The case was remanded to determine among other issues whether the wife had consented to such registration. See generally *id.* If not, the court could find fraud which would void the registration in whole or in part. See generally *id.*

505. 338 U.S. 655 (1950).

506. *Id.* at 659.

507. *Id.* at 661-64.

marriage.⁵⁰⁸ Consequently, the dissent argued the spouse is entitled to half of the life insurance proceeds in this case.

The majority held that there was no implicit exemption from the above beneficiary designation for the widow's community property rights, and those state rights were preempted.⁵⁰⁹ The majority also rejected the assertion that even if the U.S. military was required to pay the designated beneficiaries, the soldier's widow was entitled to obtain the proceeds from the designees under the community property rules. In addition to the above benefit mandate the majority pointed to the "flat conflict" of such result with the statutory provision:

Payments to the named beneficiary "shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary"⁵¹⁰

This provision differs from the Anti-Alienation Prohibition in referring to benefit payments "either before and after receipt," rather than "benefits provided by the plan."

The majority rejected three other arguments presented by the dissent. The dissent argued that many decisions held that family support claims were not preempted by anti-alienation language such as that under consideration.⁵¹¹ The majority responded that family support was not at issue in this case and community property claims rest on business relations between the spouses rather than the moral obligations upon which family support rested.⁵¹² The dissent also argued that the function of the anti-alienation provision was to protect the government insurance fund from attachments rather than from the beneficiaries.⁵¹³ Finally, the dissent stated that Congress could not have intended to permit a soldier to "defraud" his wife by using community property to purchase a life insurance policy whose benefits did not go to her.⁵¹⁴ The majority responded to the final two arguments with its above statement about the clarity of the statutory language.⁵¹⁵

The Court concluded by describing the federal interest that is served by the statute as follows:

Possession of government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman. The exemption provision is his guarantee of the complete and full performance of the contract to the exclusion of conflicting claims.

508. *Id.* at 661-62.

509. *Id.* at 659-60.

510. *Id.* at 659.

511. *Id.* at 663, n.2.

512. *Id.* at 659-60.

513. *Id.* at 664.

514. *Id.* at 663.

515. *Id.*

The end is a legitimate one within the congressional powers over national defense, and the means are adapted to the chosen end.⁵¹⁶

The Supreme Court in *Free v. Bland*,⁵¹⁷ decided in 1962 without dissent⁵¹⁸ that a surviving spouse, rather than the decedent's sole heir and son from an earlier marriage, was entitled to full ownership of a savings bond that had been acquired with community property and had been issued in the name of both spouses with an "or" between the names. Under the relevant federal regulations such designation⁵¹⁹ provided that "[i]f either co-owner dies without the bond having been presented and surrendered for payment or authorized reissue, the survivor will be recognized as the sole and absolute owner." The Court summarily dismissed the relevance of state family law with the following description of conflict preemption, that is, the effect of the Supremacy Clause in the Constitution, as follows,

"the relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. This principle was made clear by Chief Justice Marshall when he stated for the Court that any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."⁵²⁰

In particular, the survivorship provision was a federal law, which as held in *Wissner*, must prevail over any conflicting state law, such as the community property provision at issue which attempted to supersede the survivorship provision.⁵²¹ Thus, the decedent's son was not entitled to have the decedent's bond interest transferred directly to him by the federal government as of the date of the death of the decedent.

The Court held, as in *Wissner*, that the decedent's children were also not entitled indirectly to the decedent's interest in the bond, that is, they had no right to obtain the value of the inherited bond from the surviving spouse. The Court, as in *Wissner*, focused on the beneficiary designation resulting from the joint title:

Notwithstanding this [survivorship] provision, the State awarded full title to the co-owner but required him to account for half of the value of the bonds to the decedent's estate. Viewed realistically, the State has rendered applicable award of title meaningless. Making the bonds security for the payment confirms the accuracy of this view. If the State can frustrate the parties' attempt to use the

516. *Id.* at 660-61.

517. 369 U.S. 663 (1962).

518. Two of the justices did not participate in the decision.

519. *Id.* at 668, n.4.

520. *Id.* at 667 (citations omitted).

521. *Id.* at 668.

bonds' survivorship provision through the simple expedient of requiring the survivor to reimburse the estate of the deceased co-owner as a matter of law, the State has interfered directly with a legitimate exercise of the power of the Federal Government to borrow money.⁵²²

The Court also distinguished the deference for beneficiary designations for life insurance for members of the military in *Wissner* from the more limited ones applicable to designations for savings bonds.

There [in *Wissner*] the Congress made clear its intent to allow a serviceman to select the beneficiary of his own government life insurance policy regardless of state law, even when it was likely that the husband intended to deprive his wife of a right to share in his life insurance proceeds, a right guaranteed by state law. But the regulations governing savings bonds do not go that far.⁵²³

In particular, savings bond designations will not be respected where the circumstances of the purchase of the bond "manifest fraud or breach of trust."⁵²⁴

The Supreme Court next decided in 1981 in *Ridgway*,⁵²⁵ that a soldier's second wife and designated beneficiary was entitled to receive and retain all the proceeds from a life insurance policy under the Servicemen's Group Life Insurance Act of 1965.⁵²⁶ The Court also held that his first wife's minor children had no direct or indirect rights to those proceeds even though the participant's divorce judgment required him to designate them to receive those survivor benefits. There was no issue of community property, although the issue concerned a property award to the minor children. The Supreme Court stated that the case was controlled by *Wissner*⁵²⁷ and repeated the statement from that decision that was similar to the Plan Benefit Term Mandate:

Here, as there, it appropriately may be said: "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other."⁵²⁸

The Court also held that the same anti-attachment provision considered in *Wissner* was again an "independent ground" for preventing (A) a direct claim by the children on the insurer, and (B) an indirect claim for a constructive trust against the proceeds

522. *Id.*

523. *Id.* at 670.

524. *Id.* at 671.

525. 454 U.S. 46 (1981).

526. *Id.* at 50. This was a successor to the National Service Life Insurance Act of 1940, which was at issue in *Wissner v. Wissner*, 338 U.S. 655 (1950). The successor did not rely on insurance provided by the federal government, but the federal government heavily subsidized private insurance.

527. *Ridgway*, 454 U.S. at 55.

528. *Id.*

to which the second wife was entitled.⁵²⁹ The Court also cited its statements that Anti-Alienation provisions ensure that benefits actually reach the beneficiary in a decision from 1979, *Hisquierdo v. Hisquierdo*.⁵³⁰ The Court had found therein that a former spouse could not attach unassignable retirement benefits under the Railway Retirement Act.⁵³¹

The three dissenters argued that the fraud and breach of trust exception of *Free v. Bland* was applicable to the soldier who had violated a divorce order by not designating his minor children as his life insurance beneficiaries.⁵³² The majority responded that the Supreme Court had declared therein that this savings bond exception was not applicable where the issue was the designation rather than whose money was used to purchase the bonds.⁵³³ The dissent argued that the second wife was being unjustly enriched by receiving the children's entitlements and even though she may not have behaved improperly she was not entitled as a gratuitous recipient to keep the insurance proceeds to which the minor children were entitled.⁵³⁴ The soldier in this case had voluntarily waived his rights to choose a designee other than his minor children by agreeing to the divorce decree after extensive negotiations.⁵³⁵ The majority conceded that the equities favored the children, but stated that Congress had chosen not to apply such equities when it wrote the law, which insulated the benefits paid to his designated beneficiary "from attack or seizure by any other claimant."⁵³⁶

The dissenters tried to distinguish *Wissner*. They pointed to the Court's observation that alimony or family support was not at issue in *Wissner* unlike this case and the long history of exempting family support orders from preemption by Anti-Alienation provisions similar to the one at issue and spendthrift provisions in general because of the special nature of the parental legal duty.⁵³⁷ The majority responded that *Wissner* applied to community property rights, which often have elements of support, as may be the case in the property settlement at issue,⁵³⁸ rather than alimony

529. *Id.* at 57-58.

530. 439 U.S. 572, 584 (1979).

531. *Id.* Beneficiary designation was not at issue because the employee could not make beneficiary designations. *Id.* The issue was, rather, the right of the former spouse to receive part of the employee's expected retirement payments on the basis of an marital dissolution order which rested upon her community property rights. *Id.*

532. 454 U.S. at 64-70.

533. *Id.* at 58.

534. *Id.* at 72.

535. *Id.* at 80.

536. *Id.* at 62-63.

537. *Id.* at 72-81.

538. Insurance is often required to be provided for minor children to insure

or family support and the beneficiary designation resembles such a property claim more than alimony or child support and is thus subject to the same preemption.⁵³⁹

The Supreme Court in *Boggs*,⁵⁴⁰ held in 1997 in a manner similar to its decision in *Free v. Bland* that the adult children of a participant's spouse who predeceased him again could not use their mother's community property rights to establish an entitlement to any indirect interest from the amounts paid to him or his designated beneficiaries. As in that case the Court held that the community property rules were subject to conflict preemption. There appeared to be no challenge of the decision below that the plans had no direct liability to the children.⁵⁴¹

The participant's first wife died in 1979.⁵⁴² This was after the 1974 enactment of ERISA but before the 1984 enactment of REACT. In 1980, a Louisiana court ascribed to the first wife's estate an interest of \$ 21,194.29 in the undistributed interest of the participant's savings plan (the "Savings Plan").⁵⁴³ The first wife's will gave (A) the participant a life interest in her assets and one third of the remainder, and (B) her children two thirds of the remainder.⁵⁴⁴ The participant remarried within a year of the first wife's death in 1980.⁵⁴⁵ In 1985, he retired and received (A) a lump sum distribution of \$ 151,628.94 from a savings plan, which he rolled into an IRA—he made no withdrawals before his death in 1989; (B) AT&T shares from an ESOP, which he retained until his death, and (C) the initial payments of a qualified joint and survivor annuity with survivor rights in his second wife from a distinct retirement plan (the "Retirement Plan").⁵⁴⁶ Under the participant's will, his widow, the second wife, received a life interest in the AT&T shares and the widow appeared to be the sole beneficiary of the IRA.⁵⁴⁷ The adult children after the participant's death, sought the property they claimed to have been entitled to as of the date of death of their mother, namely a portion of (A) the annuity payments received by the participant during his life, (B) the annuity payments being received by the participant's widow;

that the children will continue to obtain support if the provider of child support dies. The participant was required to provide the minor children with child support. However, in this case the purpose of the insurance is not described.

539. *Id.* at 61-62.

540. 520 U.S. 833 (1997).

541. *Id.* at 838.

542. *Id.* at 836.

543. *Id.* at 837.

544. *Id.* at 836-37.

545. *Id.* at 836.

546. *Id.*

547. *Id.* at 837.

(C) the IRA account, and (D) the ESOP shares.⁵⁴⁸ There appeared to be no claim that the original order was a QDRO or subject to the REACT transition rules.⁵⁴⁹

The children did not argue that they were entitled to any payments from the Retirement Plan. The Court decided by a vote of seven for the majority and two for the dissent that the children were not entitled to receive from the widow, payment for any part of the spousal survivor benefits paid to her from the Retirement Plan in accord with the Spousal Survivor Provisions.⁵⁵⁰ The dissent, however, argued that (A) to the extent that the widow had received other assets from the estate she was liable to the children to use them to compensate them for the value of the survivor benefits that she received, and (B) ERISA was only concerned with the uniformity of payments by ERISA plans and thus, would not be violated if the widow was required to provide the children with property other than the survivor benefits that she received.⁵⁵¹ The majority rejected this argument, as the Court had done with the prior three beneficiary designation decisions. In particular, the majority observed that the statutory beneficiary designations of the Spousal Survivor Provisions were designed to insure an income stream to the surviving spouse.⁵⁵² The Court declared without any mention of the Anti-Alienation Prohibition there was Conflict Preemption because:

It would undermine the purpose of ERISA's mandated survivor's annuity to allow Dorothy, the predeceasing spouse, by her testamentary transfer to defeat in part Sandra's entitlement to the annuity § 1055 guarantees her as the surviving spouse. This cannot be. States are not free to change ERISA's structure and balance.⁵⁵³

The Court also decided by a vote of seven-two that the heirs were not entitled to an accounting from the pension plans of their mother's nonexistent community property interest in the pension plans.⁵⁵⁴ The Court pointed to the burden such an accounting would place on the pension plan, particularly if the accounting was requested years after the death of the participant's spouse as in this case or if the "couple had lived in several states," in which case several states' different entitlements may have to be

548. *Id.*

549. The REACT transition rules were not applicable because the pension plan had not honored the pre-REACT order before the enactment and did not choose to honor it after the enactment. Section 303(d) of Pub. L. 98-397, 98 Stat. 1426, 1453 (1984).

550. *Boggs*, 520 U.S. at 842.

551. *Id.* at 862-74.

552. *Id.* at 843-44.

553. *Id.* at 844.

554. There was a similar 5-4 division with respect to whether an accounting was preempted with respect to the distributions to the participant following the death of the participant's first wife.

considered.⁵⁵⁵ Regardless of the size of the accounting burden if there is no spousal entitlement to receive property of equal value at the time of the spouse's death, there is no reason to impose any burden on the ERISA plans.

The Court decided by a vote of five-four that the children were not entitled to receive a portion of (A) the Savings Plan benefits that the participant had received and rolled over into an IRA, (B) the stock the participant had received from an ESOP, or (C) the Retirement Plan annuity benefits which the participant received. The majority as the Court had in the prior three beneficiary designation decisions emphasized that under the Plan Terms Benefit Mandate⁵⁵⁶ the children were not plan beneficiaries. The majority also stated that the enactment of REACT made inapplicable the authorities for its prior 1980 decision, *In re Marriage of Campa*,⁵⁵⁷ that there was no federal issue in a state court decision that implied a nonparticipant spouse was a beneficiary by virtue of her community property rights.⁵⁵⁸ As in *Wissner*, the court "reinforced" its designation argument by referring to the Anti-Alienation Prohibition,⁵⁵⁹ but then stated:

As was true with survivors' annuities, it would be inimical to ERISA's purposes to permit testamentary recipients to acquire a competing interest in undistributed pension benefits, which are intended to provide a stream of income to participants and their beneficiaries.⁵⁶⁰

The Court repeated its *Free v. Bland* statement that giving full title to an individual but forcing the individual to account for the value is to provide meaningless title,⁵⁶¹ which like the above quote does not depend upon the Anti-Alienation Prohibition.⁵⁶²

The dissent responded by referring to the traditional concern for uniform administration of pension plans which it asserted would be achieved if decisions by plan fiduciaries to pay benefits to

555. *Id.* at 853.

556. *Id.* at 845-48.

557. 152 Cal. Rptr. 362 (1979), *cert. denied*, 444 U.S. 1028 (1980).

558. *Boggs*, 520 U.S. at 849-50. Thus, the Supreme Court explicitly overruled decisions, which reached the same result as *Campa*, such as *Stone v. Stone*, 450 F. Supp. 919 (N.D. Cal.1978), *aff'd*, 632 F.2d 740 (1980), *Savings & Profit Sharing Fund of Sears Employees v. Gago* 717 F.2d 1038, 1043 (7th Cir. 1983), and *Eichelberger v. Eichelberger*, 584 F. Supp. 899 (S.D. Tex. 1984).

559. *Id.* at 851.

560. *Id.* at 852.

561. *Id.* at 853.

562. Unlike the Social Security Act, 42 U.S.C. § 407, the Anti-Alienation Prohibition does not refer to "money paid or payable." Thus, there was no need for the Court to consider whether the pension distributions retained the quality of money by remaining in readily "withdrawable form," as it had in *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973), when it held social security benefits on deposit in a bank account were not subject to attachment by the local welfare board.

participants and designated beneficiaries were not affected. The dissent argued that this concern is not affected by decisions whether the recipient is indirectly liable to account for the value of those benefits to another person.⁵⁶³ As described, *supra*, the majority referred to the ERISA aim that participants and beneficiaries receive their intended stream of income.

The dissenters also argued that community property law did not “frustrate the statutory purposes of ERISA” but focused primarily on the applicability of its Anti-Assignment Prohibition.⁵⁶⁴ First, they argued, as the *Wissner* and *Ridgway* dissents had argued, that there is no violation of the Anti-Alienation Prohibition because community property establishes the spousal ownership at the time the pension benefits are generated.⁵⁶⁵ Second, they argued that ERISA is not concerned with the disposition of any survivor benefits (other than spousal benefits) from pension plans. Thus, they argued that state law should control the ultimate disposition of such proceeds as in this case.⁵⁶⁶ Third, they argued that (A) the probate order is not a domestic relations order because it was not issued under a domestic relations law and thus such orders are not alienations under the QDRO Provisions; and (B) by permitting transfers of pension benefits to former spouses when they are alive, Congress implied that former spouses should not be deprived of such benefits if they predecease participants.⁵⁶⁷

The majority responded that (A) the Court had to follow the Congressional directions that the spousal survivor provisions and the QDRO provisions protected the living, rather than the dead, such as a spouse predeceasing the participant; and (B) ERISA’s goal is to protect the income stream of both participants and beneficiaries, which means the benefits of both are protected from direct and indirect claims, such as the ones at issue.⁵⁶⁸

The Supreme Court held in 2001 in *Egelhoff*⁵⁶⁹ that ERISA preempts state laws that attempt to override a participant’s designation of his or her spouse in an ERISA Pension Plan or an

563. *Id.* at 862-63. *See also* Wash. State Dep’t of Social and Health Services v. Keffeler, 537 U.S. 371 (2003) (emphasizing that the Social Security protection for distributed social security benefits was confined to actions that constituted “execution, levy, attachment, garnishment, or other legal process”). This phrase was held not to apply to a local social services department, which while acting as the representative of foster children collecting SSI, applied the SSI payments to reimburse the department for its expenses to support the children.

564. *Id.* at 863-64.

565. *Id.*

566. *Id.* at 864-66.

567. *Id.* at 866-68.

568. *Id.* at 854.

569. 532 U.S. 141 (2001).

ERISA Insurance Plan upon the participant's divorce. Thus, as in *Boggs*,⁵⁷⁰ the adult children of the participant's first wife were not entitled to obtain the benefits either directly from the plan or indirectly from the participant's second wife and designated beneficiary. The Court also devoted considerable attention to the Plan Terms Benefit Mandate, but declined to use Conflict Preemption but instead used the broader ERISA Explicit Preemption.⁵⁷¹ However, the court stated:

And as we have noted, the statute at issue here directly conflicts with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents.⁵⁷²

The majority concluded that the state statute was preempted because it had two impermissible connections with ERISA plans. First,

the administrators must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents. *The statute thus implicates an area of core ERISA concern.* In particular, it runs counter to ERISA's commands that a plan shall "specify the basis on which payments are made to and from the plan," § 1102(b)(4), and that the fiduciary shall administer the plan "in accordance with the documents and instruments governing the plan," § 1104(a)(1)(D), *making payments to a "beneficiary" who is designated by a participant, or by the terms of [the] plan.*" § 1002(8).⁵⁷³

Second, it interferes with nationally uniform plan administration because:

Plan administrators cannot make payments simply by identifying the beneficiary specified by the plan documents. Instead they must familiarize themselves with state statutes so that they can determine whether the named beneficiary's status has been "revoked" by operation of law. And in this context the burden is exacerbated by the choice-of-law problems that may confront an administrator when the employer is located in one State, the plan participant lives in another, and the participant's former spouse lives in a third. In such a situation, administrators might find that plan payments are subject to conflicting legal obligations.⁵⁷⁴

570. 520 U.S. 833 (1997).

571. Two of the justices in a concurring opinion observed that the court found that state law was connected with ERISA because it conflicted with ERISA and thus the Court was applying Conflict Preemption. *Egelhoff*, 532 U.S. at 152-53.

572. *Id.* at 150.

573. *Id.* at 147 (emphasis added).

574. *Id.* at 148-49 (emphasis added; citations omitted).

The Court rejected the argument that the state law did not impose an undue burden on plan administrators because administrators could avoid liability to a second claimant either by refusing to make payments until the benefit dispute is resolved or by following plan designations unless they had notice of a marital dissolution.⁵⁷⁵ However, the Court noted that (A) a plan would thereby transfer to the beneficiaries the cost of delay and uncertainty by delaying payment until the dispute is resolved, and (B) a plan making payments in accord with the beneficiary designation would expose the administrators to the risk that a claim may be made that the administrators had actual knowledge of the marital dissolution. Furthermore,

[u]nder the text of ERISA, the fiduciary “shall” administer the plan “in accordance with the documents and instruments governing the plan,” 29 U.S.C. § 1104(a)(1)(D). The Washington statute conflicts with this command because under this statute, the only way the fiduciary can administer the plan according to its terms is to change the very terms he is supposed to follow.⁵⁷⁶

The majority also rejected the two dissenters’ assertion⁵⁷⁷ that the plan was ambiguous because it failed to specify what happens to a spousal designation in the case of a divorce. The dissenters had asserted that state law presented a needed rule of interpretation, which may best reflect the employee’s likely intention. The majority responded that the divorce of the participant and the spouse creates no ambiguity in the participant’s identification of the designee as the participant’s spouse.⁵⁷⁸ Furthermore, the need to rely on state law to determine if there had been a revocation of the designation and the new designee would result in the very non-uniform beneficiary designations which ERISA preemption is designed to avoid.⁵⁷⁹

The two dissenters asserted that family law may not be preempted unless the state statute does substantial damage to “clear and substantial federal interests”⁵⁸⁰ as described in *Hisquierdo v. Hisquierdo*.⁵⁸¹ In particular, plan administrators must resort to state law to determine who is a spouse or who is a child, so why may they not do the same to determine whether a

575. *Id.* at 149.

576. *Id.* at 151, n.4.

577. *Id.* at 154-57.

578. *Id.* at 148, n.2.

579. *Id.* at 148-49.

580. *Id.* at 157-60.

581. 439 U.S. 572 (1979). However, immediately after that reference the Court referred to four instances where such damage was found and concluded there was also such damage when a spouse attempted to use community property law to obtain a portion of the participant’s expected railroad pension. *Id.*

participant wishes to continue to have a spouse as a beneficiary. If the plan sponsor wishes to avoid resort to state law, it can simply provide that state law is irrelevant in such determinations. In fact, in *Mackey* the Court permitted a far more significant burden to be imposed upon plans by allowing levies on welfare plan benefits.⁵⁸² The dissenters also argued⁵⁸³ that Washington's law "furthers ERISA's ultimate objective—developing a fair system for protecting employee benefits." In particular, they asserted that the revocation rule is consistent with the general rule of the Uniform Probate Code and prevents the former spouse from receiving an unexpected windfall as in this case where the divorce settlement, in which the participant retained all of his pension benefits. As a result of the majority's decision the former spouse thus received a windfall of 80,000 dollars six months after the divorce.⁵⁸⁴ Finally, the dissent asserted that under the Court's reasoning slayer statutes, which in many states prevent designees who kill participants from being entitled to plan benefits would be preempted because they differ from state to state in fact differ from state to state.⁵⁸⁵

The majority response was that "this [state] statute governs the payment of benefits, a central matter of plan administration,"⁵⁸⁶ and is thus preempted as described within this Article.

VIII. THE APPLICATION OF FEDERAL COMMON LAW TO AMBIGUOUS ERISA BENEFICIARY DESIGNATIONS OTHER THAN STATUTORY DESIGNATIONS

In 1989, the Supreme Court set forth the ERISA standards for courts to review plan denials of benefit claims.⁵⁸⁷ The decision was based in part on a proposition the Court had set forth earlier: "We have held that courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'"⁵⁸⁸ In 1993,

582. *Id.* at 158. However, as discussed, *supra*, *Guidry*, *Great-West Life*, and *Sereboff* suggest that *Mackey* may no longer be applicable. Moreover, the *Mackey* Court disregarded the burden imposed on the plan by the garnishments.

583. *Id.* at 158.

584. *Id.* at 159. This is similar to the waiver argument made by the dissenters in *Ridgway* where it was also disregarded.

585. *Id.* at 160. The dissent is correct about the prevalence and the differences among slayer statutes. However, that issue was not before the Court, which declined to decide it at this time.

586. *Id.* at 148.

587. *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101 (1989). See generally Kathleen Kennedy, *Judicial Standard of Review in Erisa Benefit Claim Cases*, 50 AM. U.L. REV. 1083 (June 2001).

588. *Bruch*, 489 U.S. at 111 (quoting dicta in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)).

the Supreme Court held in *Mertens v. Hewitt Associates*,⁵⁸⁹ that the ERISA § 502(a)(3) explicit limit on relief to equitable relief implied that monetary damages are not available against non-fiduciaries who participated in a fiduciary breach. The Court justified the decision in part by stating:

The authority of courts to develop a “federal common law” under ERISA, see *Firestone*, 489 U.S. at 110, is not the authority to revise the text of the statute.⁵⁹⁰

Courts must therefore limit federal common law to cases where it is necessary to “fill true gaps in the statute - when the creation of a subsidiary or collateral rule is necessary to carry out an explicit congressional directive.”⁵⁹¹

The cases addressing the substantial compliance of plan designation forms are an excellent example of the kind of ERISA gaps federal common law addresses and how it addresses such gaps without violating the Explicit ERISA Preemption.⁵⁹² The Fourth Circuit in 1994 in *Phoenix Mutual Life Insurance Co. v. Adams*,⁵⁹³ considered a claim by the participant’s second wife to approximately 300,000 dollars in proceeds of an employer life insurance policy. There was an issue because the change of beneficiary designation form that the participant had submitted and confirmed with the plan did not have the designee listed in the correct place and the employer failed to make the correction as instructed by the participant and to add requisite salary information. The plan insurer interpleaded when the participant’s son, the prior designee under the plan, refused to relinquish any plan benefit claim. The Court correctly found that ERISA preempted the local state substantial compliance doctrine, namely that a designation which “substantially complies” with a plan’s terms is effective.⁵⁹⁴ The Court explicitly disagreed with the Tenth Circuit which had held in *Peckham v. Gem State Mutual of Utah*,⁵⁹⁵ that there was no such preemption because that court found that the state law would not substantially modify the plan. The *Phoenix* court observed that this is not the ERISA preemption standard⁵⁹⁶ because the ERISA Explicit Preemption preempts any

589. 508 U.S. 248 (1993).

590. *Id.* at 259.

591. See Jeffery A. Brauch, *The Federal Common Law of ERISA*, 21 HARV. J.L. & PUB. POL’Y 541, 545 (1998) (defending the stated proposition).

592. See generally Meridith Bogart, Note, *State Doctrines of Substantial Compliance: A Call for ERISA Preemption and Uniform Federal Common Law Doctrine*, 25 CARDOZO L. REV. 447 (2003).

593. 30 F.3d 554 (4th Cir. 1994).

594. *Id.* at 558-62.

595. 964 F.2d 1043, 1052-53 (10th Cir. 1992).

596. The Ninth Circuit joined the Tenth Circuit in finding no preemption in *Bank of America Pension Plan v. McMath*, 206 F.3d 821, 828 (9th Cir. 2000).

law that “relates to ERISA plans.” The Supreme Court applied the same analysis in *Egelhoff* to reject a similar claim of non-preemption based on the assertion that the state law did not modify but clarified plan terms.⁵⁹⁷ The Court correctly identified the existence of an ERISA gap but characterized it incorrectly:

[ERISA] contains no provision expressly governing the change of beneficiaries pursuant to a given policy. ERISA is silent on the matter of which party shall be deemed beneficiary among disputing claimants.⁵⁹⁸

The applicability of common law is not related to the existence of a dispute between beneficiaries. The rights of the participant’s widow are determined by the plan terms under the ERISA rather than by whether another party chooses to claim those same benefits.⁵⁹⁹ However, the Court focused on the correct ERISA gap. With the exception of the two statutory designations, for spousal survivor benefits and QDROs, ERISA does not set forth the conditions a beneficiary designation must fulfill to satisfy the requirement that an ERISA plan be established and maintained pursuant to a written document.⁶⁰⁰ The Court was not presented with the actual plan, although it was asked to interpret the plan’s designation procedures, when the plan fiduciaries declined to interpret the terms of their plan and interpleaded.⁶⁰¹ The Court observed that the *Peckham* court was correct that substantial compliance does not modify the plan terms and so the *Mertens* test of no statutory change by federal common law is fulfilled:

Application of the doctrine in the instant context will not compromise any of the rights of or impose any additional obligations on plan administrators or sponsors. The doctrine does not conflict

597. 532 U.S. 141 (2001).

598. *Phoenix Mut. Life Ins.*, 30 F.3d at 562.

599. Furthermore, a release of the plan by the other claimant is of dubious effectiveness. See generally Albert Feuer, *When Are Releases of Claims for ERISA Plan Benefits Effective?*, 38 J. MARSHALL L. REV. 773 (2005).

600. ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) (2000).

601. Plan terms often give plan administrators considerable discretion in the design and interpretation of beneficiary designation forms. Thus, these questions are mooted in the more common situation where the plan decides the validity of a beneficiary designation under the arbitrary and capricious standards of many plans. See, e.g., *Alliant Techsystem v. Marks*, 465 F.3d 864 (8th Cir. 2006) (using such a stated standard to defer to the Plan’s holding that a beneficiary designation could be effective even if the participant left blank the relation of the beneficiary to him). However, there was a remand to consider whether the participant had sufficient capacity to execute the designation or whether he was under undue influence, although the court did not discuss how to make either determination. *Id.*; see also *O’Shea, Jr. v. First Manhattan Co. Thrift Plan & Trust* 55 F.3d 109,114 (2d Cir. 1995) (similar result when the participant failed to sign the designation because he was not given the signature page).

with ERISA's statutory provisions because ERISA is silent on the matter.⁶⁰²

The Court then explained that federal common law should be consistent across the circuits and draw on the recognized state common law of substantial compliance.⁶⁰³ The Court found that the lower court thus correctly rejected the unduly demanding law of substantial compliance of South Carolina, the state in which the lower court was located. In particular, the Court agreed with the local court that there is substantial compliance if the following prevailing compliance standards are satisfied:

[T]he insured: (1) evidences his or her intent to make the change and (2) attempts to effectuate the change by undertaking positive action which is for all practical purposes similar to the action required by the change of beneficiary provisions of the policy.⁶⁰⁴

The Sixth Circuit in *Tinsley v. GM, Metropolitan Life*, reached a similar conclusion about the need to apply federal common law when a claim was made that the participant was under undue influence when he made the designation at issue.⁶⁰⁵ The gap the court correctly focused on was the lack of any ERISA provision regarding the validity of a plan designation.⁶⁰⁶ The court used court decisions and an *American Jurisprudence* article to determine the general principles of the prevailing federal common law that it directed the lower court to apply on remand. On the other hand, the Sixth Circuit, in a 1991 unreported decision, held there was no difference between federal common law of substantial compliance and the applicable local law without any consideration of the federal rules.⁶⁰⁷

The Seventh Circuit in *Metropolitan Life v. Johnson*⁶⁰⁸ cited and applied *Phoenix*. In that case the participant received a letter from the plan accepting the beneficiary change even though the beneficiary designation form checked off the wrong employer insurance plan, referred to his divorced wife as a separated wife and used his mother's address as his address. The Court referred to *Egelhoff* for the proposition that the local law regarding substantial compliance was preempted. The Court repeated the similar but incorrect *Phoenix* description of the ERISA gap:⁶⁰⁹ "ERISA is silent as to the resolution of disputes between putative beneficiaries of a life insurance policy." Again, the gap is whether

602. *Phoenix Mut. Life Ins.*, 30 F.3d at 563.

603. *Id.* at 564.

604. *Id.*

605. 227 F.3d 700 (6th Cir. 2000).

606. *Id.* at 704.

607. *Aetna Life Ins. Co. v. Weatherford*, 924 F.2d 1057 (1991) (substantial compliance generally requires delivery of the beneficiary change form).

608. 297 F.3d 558 (7th Cir. 2002).

609. *Id.* at 567.

a beneficiary designation complies with the requirement that a plan be established and maintained pursuant to written plan documents. The Court adopted the same prevailing common-law rule as *Phoenix* and also concluded that the designation was effective.

The Second Circuit's district courts consistently applied the *Phoenix* substantial compliance rules. The *Phoenix* principles were applied in 1995 in *Connecticut General Life Insurance v. Mitchell* to accept an unsigned beneficiary designation change.⁶¹⁰ The Court had a substantial compliance issue because earlier in the same year the Second Circuit held that NY EPTL 13-3.2(e) which requires pension plan designations to be signed, is preempted by ERISA.⁶¹¹ By contrast, the *Phoenix* principles were applied in 2003 in *American International Life Assurance Company v. Vasquez*⁶¹² to determine that merely obtaining a change of beneficiary form is not sufficient to establish substantial compliance.⁶¹³ In that case, the beneficiary designation was destroyed with the World Trade Center on September 11, 2001. In particular, the court held that \$500,000 of life insurance be split between the participant's second wife from whom he was separated at the time of his death, and his daughter from an earlier marriage.⁶¹⁴ Finally, in 2007, the court required a factual inquiry to determine whether an undated beneficiary designation change that was supposedly sent by an attorney no longer representing the participant, which benefitted the spouse of a person who the participant had accused of misappropriating his funds.⁶¹⁵

There were similar holdings in Sixth Circuit district courts. The *Phoenix* principles were applied in 2002 in *Life Insurance Co. of North America v. Leeson*,⁶¹⁶ to reject a claim for life insurance

610. 1995 U.S. Dist. LEXIS 11222 (S.D.N.Y. Aug. 7, 1995).

611. *O'Shea, Jr. v. First Manhattan Co. Thrift Plan & Trust* 55 F.3d 109,114 (2d Cir. 1995) (lack of signature did not render designation ineffective).

612. 2003 U.S. Dist. LEXIS 2675 (S.D.N.Y. Feb. 24, 2003).

613. *See also Prudential v. Schmid*, 337 F. Supp. 2d 325 (2004) (applying the *Phoenix* principles to find that there was no beneficiary change). The plan responded to a request by a participant's request for beneficiary and a change of beneficiary form so he could choose his new wife as the beneficiary with correspondence that she was the beneficiary and a change in beneficiary form. *Id.* The court found that the participant had not substantially complied with the change of beneficiary requirements. The second wife did not bring a fiduciary breach action. *Id.*

614. There was ambiguity about whether the daughter was named on all ERISA policies but the participant was found to have intended benefit both his daughter and separated wife. Moreover, while he expressed interest in changing his beneficiary to his mother, there was no evidence that he went beyond obtaining change in beneficiary forms. *Id.*

615. *Hartford Life Ins. Co. v. Einhorn*, 497 F. Supp. 2d 398 (E.D.N.Y. 2007).

616. No. C2-00-1394, 2002 U.S. Dist. LEXIS 18530 (S.D. Ohio March 18,

benefits by the participant's widow because the participant never submitted the designation form in question to the plan. Thus, the second requirement was not satisfied. *Tinsley* but not *Phoenix* was cited in 2006 in *Basto v. Millwrights' Local 1102 Supplemental Pension Fund*.⁶¹⁷ The *Basto* court held that a beneficiary designation was effective even though the designee was described as the participant's wife when they were not married and she had refused to marry him. The court asked questions similar to those in *Phoenix* after declaring that the clarity of the plan terms made it unnecessary to resort to federal common law. Did the participant comply with the terms of the plan and was the participant's intent expressed clearly? The Court found both questions were answered affirmatively; thus, the designee was entitled to the survivor benefits of 45,000 dollars.⁶¹⁸

IX. THE LOWER COURTS WRONGFULLY TREAT DIVORCE DECREE DIRECTIVES IN WHICH PARTICIPANTS NAME OR MAINTAIN PERSONS AS PLAN BENEFICIARIES AS QDROS THAT OVERRIDE LIFE INSURANCE BENEFICIARY DESIGNATIONS

The ERISA Explicit Exemption preempts DROs, which attempt to determine who receives ERISA life insurance plan benefits, in the same manner that the state law that attempted to determine who was entitled to the benefits of an ERISA life insurance plan following the participant's divorce was preempted in *Egelhoff*.⁶¹⁹ Such DROs may not be QDROs, which, as discussed, may only pertain to ERISA pension benefits.⁶²⁰ Thus, DROs may not be incorporated into life insurance plans unless such plans provide for such incorporation. Therefore, persons may not rely on such orders to obtain the life insurance proceeds either directly from the plan or indirectly from the designees under such plan.⁶²¹

On the other hand, many courts have held that state domestic relations orders may determine who is entitled to benefits from ERISA life insurance plans because they find that such orders may be QDROs. Six of the seven circuits that have considered the issue have adopted this position.⁶²² These principles are so widely

2002).

617. No. 2:04-CV-258, 2006 U.S. Dist. LEXIS 16280 (W.D. Mich. March 24, 2006).

618. *Id.* at *21-27.

619. 532 U.S. 141 (2001).

620. See also Comment Letter of New York City Bar Association (May 7, 2007) 2, available at <http://www.dol.gov/ebsa/pdf/Glover050707.pdf> (pertaining to the Interim Rule Relating to Time and Order of Issuance of Domestic Relations Orders).

621. ERISA §§ 402(a), 404(a)(1)(D); 29 U.S.C. §§ 1102(a), 1104(a)(1)(D).

622. *Barrs v. Lockheed Martin Corp.*, 287 F.3d 202 (1st Cir. 2002); *Metro. Life Ins. Co. v. Bigelow*, 283 F.3d 436 (2d Cir. 2002); *Metro. Life v. Pettit*, 164

accepted that in 2007 a district court considered whether an attorney committed malpractice by not serving such an order before the participant violated such order by naming his new wife rather than his infant son as the beneficiary of the life insurance.⁶²³ The reasoning of those cases finding life insurance QDROs, which rests on two of the earliest decisions, does not withstand close scrutiny.

The Eleventh Circuit in 1991 in *Brown v. Connecticut General Life Insurance*, found such orders were preempted.⁶²⁴ The majority held that the participant's designee, his widow, was entitled to the 134,000 dollars in proceeds from his employer's life insurance plan.⁶²⁵ The court rejected a claim by the participant's former wife, which was based on a provision in the judgment of divorce that the participant would⁶²⁶ "keep the Plaintiff [Katharine Mary Ann Brown] as beneficiary on the life insurance now in effect on his life for as long as she remains unmarried." The controversy concerned the effect of the participant's subsequent employment change on the above commitment. The circuit court of appeals found the former spouse's claim was preempted under the ERISA Explicit Preemption. The majority did not discuss the dissent's argument that the divorce judgment constituted a QDRO and thus not preempted.

The Tenth Circuit reached a different result in the same year in *Carland v. Metropolitan Life*.⁶²⁷ In that case, the participant's former wife was found entitled to the entire 51,000 dollars in proceeds from his employer's life insurance plan upon his death in 1987. The court rejected a claim from the widow based on her being the designee under the plan's explicit terms. Under the terms of the property settlement agreement incorporated into the 1964 divorce decree the participant was required to irrevocably designate his former spouse as the sole beneficiary of the "current

F.3d 857 (4th Cir. 1998); *Metro. Life Ins. Co. v. Marsh*, 119 F.3d 415 (6th Cir. 1997); *Metro. Life Ins. v. Wheaton*, 42 F.3d 1080 (7th Cir. 1994); *Carland v. Metro. Life*, 935 F.2d 1114 (10th Cir. 1991). The Third Circuit recently observed in dicta that "every Court of Appeals" that had addressed that question held that QDROs applied to life insurance plans and referenced these cases. *Metro. Life v. Price*, 2007 U.S. App. LEXIS 21076 (3d Cir. Sept. 4, 2007). *But see* *Brown v. Conn. Gen. Life Ins.*, 934 F.2d 1193 (11th Cir. 1991) (finding that ERISA preempted such an order).

623. *See* *Mattingly v. Hoge III*, 2007 U.S. Dist. LEXIS 5221 (W.D. Ky. Jan. 23, 2007) (the decision was premised on the life insurance plan agreement that the order was a QDRO). No malpractice was found in part because even if notified in advance the order did not require the plan to pay benefits to any specified individual or individuals. *Id.*

624. 934 F.2d 1193 (11th Cir. 1991).

625. *Id.*

626. *Brown v. Conn. Gen. Life Ins. Co.*, No. CV89-H-1430-S, 1990 U.S. Dist. LEXIS 20975, at *3 (N.D. Ala. May 17, 1990).

627. 935 F.2d 1114 (10th Cir. 1991).

value” of the named life insurance minus 1,000 dollars. Metropolitan paid the new wife the entire proceeds.⁶²⁸

The court engaged in a two-step analysis. First, it held that divorce decrees with respect to any ERISA plan fit within the QDRO exclusion of ERISA § 514(b)(7), 29 U.S.C. § 1144(b)(7), from the ERISA Explicit Preemption. In particular, the court stated,⁶²⁹ “[b]ecause the reference in the preemption clause to section 1056(d)(3)(B)(i) does not restrict application of the statutory preemption exception to pension benefit plans, however, we interpret the exception to apply to all qualifying domestic relation orders whether they involve a pension or welfare benefit plan.” Second, it discussed the effect of the decree. The Court asserted that the order “satisfied the [QDRO] statutory requirements” for a beneficiary designation pursuant to plan terms. Thus, the plan fiduciaries were required to follow such designation.⁶³⁰

The Court’s assertion that a DRO for life insurance benefits satisfied the statutory requirements, which can only refer to all the requirements of the QDRO statutory beneficiary designation⁶³¹ highlights the fatal flaw of the Court’s argument. It is not consistent with the actual language of ERISA. Orders described in ERISA § 206(d)(3)(B)(i), 29 U.S.C. § 1056(d)(3)(B)(i) become beneficiary designations only if they comply with the other sections of paragraph ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3). In particular, Section (J) establishes that an alternate payee as defined in Section (K) is a plan beneficiary for all purposes, i.e., is entitled to plan benefit payments. The benefits to which the alternate payees are entitled are set forth in Section (A). However, that section provides that each pension plan “shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.” There is no comparable designation provision for non-pension plans. Finally, Section (L) explicitly limits paragraph (d)(3) to plans covered in ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1). Those plans are a subset of pension plans and thus exclude non-pension plans. Therefore, there can be no life insurance QDROs.

The Seventh Circuit reached the same result three years later in *Metropolitan Life Insurance v. Wheaton*.⁶³² In that case, the participant’s children from a dissolved marriage were found

628. See generally *id.* (describing how in 1974 the participant named his new wife as the beneficiary of all the life insurance proceeds, but in response to the claim by the former wife, the new wife paid the former wife the \$13,000, which was the claimed “current value” of the policy at the time of the divorce).

629. *Id.* at 1119-20.

630. *Id.* at 1121-22.

631. It does not qualify for the only other ERISA statutory beneficiary designation, the Surviving Spouse Provisions.

632. 42 F.3d 1080 (7th Cir. 1994).

entitled to the entire 60,000 dollars in proceeds from his employer's life insurance plan upon his death. The court rejected the widow's claim, which was based on her being the designee under the plan's explicit terms. The divorce decree included a stipulation that the participant would maintain his existing life insurance on his children as long as any were below the age of majority, but the participant named his new wife as the sole beneficiary of his employer's life insurance and died before the children reached such age.

The court first suggested that the beneficiary designations of a welfare plan may not be subject to the ERISA Explicit Preemption.⁶³³ *Egelhoff* dispatched that argument by holding that the ERISA Explicit Preemption preempted a state law that attempted to determine who was entitled to life insurance proceeds. The court also made unsupported assertions⁶³⁴ that QDROs are not restricted to pension plans in the definition of ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3). This assertion has been refuted, *supra*. Finally, the court described its interpretation as a "literal reading" of ERISA⁶³⁵ in the course of making a policy argument that there was no reason for Congress to provide an exclusion from plan designations for pension plans but not for welfare plans.

The Sixth Circuit reached the same result three years later in *Metropolitan Life Insurance v. Marsh*.⁶³⁶ In that case, the participant's children from a dissolved marriage were found entitled to two thirds of the 60,000 dollars in proceeds from his employer's life insurance plan upon his death. The court rejected the widow's claim, which was based on her being the sole designee under the plan's explicit terms at the time of his 1995 death. Under the 1978 divorce decree which incorporated a property settlement the participant agreed to designate his minor children as the beneficiaries of two thirds of his employer's life insurance. The Court found that the Plan Terms Benefit Mandate applied to welfare plans. However, it agreed with *Wheaton* and *Carland* that the QDRO provisions applied to welfare plans and it quoted the *Carland* statutory analysis and the *Wheaton* assertions.⁶³⁷

The Fourth Circuit reached the same result one year later in *Metropolitan Life Insurance v. Pettit*.⁶³⁸ In that case, however, the

633. *Id.* at 1082.

634. *Id.*

635. *Id.* at 1083-84.

636. 119 F.3d 415 (6th Cir. 1997); see also *Aetna Life Ins. v. Montgomery*, 286 F. Supp. 2d 832 (E.D. Mich. 2003) (citing *Marsh* for the proposition that QDROs may apply to life insurance plans, but concluding that a waiver by the participant's spouse of any interest in the participant's life insurance plan did not fulfill the conditions of a QDRO).

637. *Id.* at 421-22.

638. 164 F.3d 857 (4th Cir. 1998).

participant's widow was held to be entitled to all the proceeds from the employer's life insurance plan because the prior spouse did not have a QDRO to establish her benefit entitlement. Under the property settlement agreement incorporated into the divorce decree the participant was required to maintain 200,000 dollars of life insurance in favor of his former spouse, but there was no mention of the employer provided life insurance in the agreement. As in *Marsh* there was a holding that beneficiary designations relate to ERISA plans and thus absent an exclusion the court order is preempted. The Court, however, found that QDROs provide such exclusion for welfare plans, as well as pension plans.⁶³⁹ The Court cited the conclusions in *Carland* and *Marsh*⁶⁴⁰ and *Wheaton* for its "literal reading" of ERISA § 514(b)(7), 29 U.S.C. § 1144(b)(7).

The Second Circuit reached the same result four years later in *Metropolitan Life Insurance v. Bigelow*.⁶⁴¹ In the 1983 settlement agreement associated with the participant's marital dissolution, the participant agreed to maintain his children as the irrevocable beneficiaries of the life insurance plan and retirement plan provided by his employer. However, before his 1999 death he had designated his father as the sole beneficiary of his survivor benefits under both those plans. As in *Pettit*, the court held that beneficiary designations relate to ERISA plans and thus absent exclusion the court order is preempted. However, the court held that QDROs provide such exclusion for pension and welfare plans.⁶⁴² The court cited ERISA § 514(b)(7), 29 U.S.C. § 1144(b)(7), and its agreement with the analysis in *Carland*, *Wheaton*, *Marsh*, and *Pettit*.⁶⁴³

The First Circuit reached the same conclusion the same year in *Barrs v. Lockheed Martin Corp.*, although it observed a literal interpretation of ERISA raised some questions about this conclusion.⁶⁴⁴ In the 1989 separation agreement adopted by court decree, participant agreed to make his wife the irrevocable beneficiary of all his existing life insurance policies. The participant's employer was acquired by another company and the participant named his new wife as the beneficiary on the new policy. Following the participant's 1994 death the former wife learned that she had been displaced and the original life insurance policy no longer existed. Thus, she could not make a benefit claim against the former insurer, but instead sought relief based on the asserted breach by the original insurer of its disclosure obligations

639. *Id.* at 863.

640. *Id.*

641. 283 F.3d 436 (2d Cir. 2002).

642. *Id.* at 440.

643. *Id.*

644. 287 F.3d 202 (1st Cir. 2002).

to her. The court dismissed these claims. In discussing the fiduciary obligations of the insurer to inform the former wife of the beneficiary and insurance changes the court declared that (A) it agreed with the holdings of *Carland*, *Wheaton*, *Marsh*, and *Pettit*, and (B) the QDRO exclusion from the ERISA Explicit Exemption was not limited to pension plans.⁶⁴⁵ Almost immediately after this string citation, the court stated⁶⁴⁶ that “taken literally” the provisions requiring disclosure of QDROs to alternate payees, ERISA § 206(d)(3)(G), 29, U.S.C. § 1056(d)(3)(G), are not applicable to welfare plans because of ERISA § 206(d)(3)(L), 29, U.S.C. § 1056(d)(3)(L). Rather than ask why any provisions of Paragraph (d)(3) apply to welfare plans in such situations, the court simply deferred to the cited circuit decisions. None of those decisions mentioned Section (L), although *Wheaton* advocated a literal interpretation of statutory language rather than a flexible interpretation.⁶⁴⁷ However, although the court accepted, *arguendo*, the applicability of those QDRO disclosure requirements to welfare plans, it found no fiduciary breach.

District courts in circuits other than the First, Second, Fourth, Sixth, Seventh and Tenth Circuits have also treated domestic relations orders that attempt to determine who is entitled to the proceeds of ERISA life insurance plans as QDROs which determine entitlements to the insurance proceeds. For example, this was done in the Fifth Circuit in *Metropolitan Insurance Co. v. Valdepena*, which relied on a string citation of the six circuits reaching such conclusion.⁶⁴⁸ Despite the contrary holding in *Brown v. Connecticut General Life Insurance*,⁶⁴⁹ *Pettit* was cited by a district court in the Eleventh Circuit, *Metropolitan Life Insurance Co. v. Williams*, that held that the former spouse was entitled to life insurance proceeds rather than the designee on the basis of what it held to be a QDRO.⁶⁵⁰

Finally, none of the life insurance DROs satisfy the QDRO definition of ERISA § 206(d)(3)(B)(i), 29 U.S.C. § 1056(d)(3)(B)(i), even considered in isolation. Under Section (A), QDROs are beneficiary designations determining which beneficiaries and benefits the plan will pay. Thus, Section (B) requires that a QDRO create, recognize or assign the “right to receive” all or a portion of the benefits payable with respect to a participant. In particular, if the plan does not pay the person designated on the

645. *Id.* at 209, n.6.

646. *Id.* at 209.

647. 42 F.3d 1080, 1084 (1997).

648. No. SA-05-CA-140-XR, 2006 U.S. Dist. LEXIS 8010 (W.D. Tex. Feb. 6, 2006).

649. 934 F.2d 1193 (11th Cir. 1991).

650. 82 F. Supp. 2d 1346 (M.D. Fla. 1999).

face of the order, the person may obtain relief from the plan.⁶⁵¹ This is in fact the case with a classical QDRO applicable to the pension benefits most similar to life insurance proceeds, survivor benefits of a pension plan, which declares that a specified person has a right to those survivor benefits.⁶⁵² This is not the case with an order that a participant designate or refrain from designating a specified person as his survivor beneficiary, as is done with the life insurance DROs. The specified person has no right from the face of the order to obtain relief from the plan if the plan refuses to pay him or her the life insurance proceeds the order does not designate them as the beneficiary.

The court in *Unicare v. Chantal Phanor*,⁶⁵³ responded to similar arguments that a life insurance DRO was not a QDRO with the assertion⁶⁵⁴ that the courts could grant equitable relief by imposing a constructive trust on the proceeds so the specified person would receive the life insurance in the same manner as they would with respect to life insurance that is not part of an ERISA plan but is subject to a similar state domestic relations order. However, as the Supreme Court held in both *Boggs v. Boggs*⁶⁵⁵ and *Egelhoff v. Egelhoff*,⁶⁵⁶ parties who are not entitled to benefits directly from ERISA plans are not entitled to those benefits indirectly from the recipients. Thus, such equitable relief would not be available.

X. THE LOWER COURTS WRONGFULLY OVERRIDE BENEFICIARY DESIGNATIONS BECAUSE THE PARTICIPANT BREACHED AN "AGREEMENT" TO CHANGE THE DESIGNATION OF A LIFE INSURANCE PLAN

Several courts have held that benefit designation commitments in divorce decrees pertaining to ERISA life insurance plans are benefit designations even though such

651. See ERISA § 206(d)(3)(I); 29 U.S.C. § 1056(d)(3)(I) (2000) (explaining that ERISA may, however, excuse violations when the plan fiduciaries satisfied their fiduciary obligations).

652. See, e.g., Section E of IRS Notice 97-11; 1997-1 C.B. 379 (providing sample QDROs which were prepared pursuant to Congressional instructions in Section 1457(a)(2) of the Small Business Job Protection Act of 1996, P.L. 104-188).

653. No. 05-11355-JLT, 2007 U.S. Dist. LEXIS 6136 (D. Mass. Jan. 30, 2007). In that case the wife of a participant received the life insurance proceeds of an employer life insurance plan rather than the girlfriend who he designated as his beneficiary contrary to a court order that he not change beneficiaries of any employer beneficiaries during the course of the proceeding. Although, the order satisfied almost none of the specific QDRO requirements the court found it to be a QDRO. *Id.*

654. *Id.* at *22.

655. 520 U.S. 833 (1997).

656. 532 U.S. 141 (2001).

commitments are not part of the plans. Thus, the plans are being directed to violate what the Supreme Court described in 2001 in *Egelhoff*⁶⁵⁷ as a core ERISA mandate, the Plan Terms Benefit Mandate, that is, the ERISA requirement that plan benefits be determined by the plan terms.

The earliest decision in 1991, *Central States Health & Welfare Fund v. Boyd*,⁶⁵⁸ found that a former wife of a participant was entitled to 16,000 dollars in proceeds from an employer life insurance plan. The court denied the claim of the widow (his designee) because under the property settlement agreement that was incorporated into the participant's divorce decree he agreed to designate his former wife as the irrevocable beneficiary of such life insurance. The court engaged in a three-step analysis. First, it asserted that ERISA does not address whether a participant may waive his right to designate a beneficiary.⁶⁵⁹ In short, there was an ERISA gap. Second, federal common law needed to be consulted, which meant the prevailing state common law had to be consulted, as long as that law "comport[ed] with the policy behind ERISA." The prevailing state common law was that if a divorce decree requires that an irrevocable life insurance beneficiary designation be made, the designee is entitled to the proceeds.⁶⁶⁰ Third, the policy was consistent with ERISA because the purpose of the requirement that plan terms be determined by written terms is to avoid undue burdens on plan administrators to search for and review such court decrees.⁶⁶¹

The court's argument rests on a fallacious presumption.⁶⁶² There was no ambiguity, or ERISA gap, for federal common law to resolve. The plan designation was unambiguous. The plan terms did not reference waivers. Thus, waivers did not affect plan benefit designations. ERISA permits DROs to be beneficiary designations only if the orders are QDROs (or otherwise referenced in the plan terms). The waivers at issue are part of DROs, which are not QDROs to the extent of such part. Therefore, the court was trying to use federal common law to give effect to orders that ERISA preempts, rather than using federal common law appropriately to interpret ERISA plan terms that are ambiguous.⁶⁶³ Thus, the Supreme Court direction in *Mertens* that

657. 532 U.S. 141, 147 (2001).

658. 762 F. Supp. 1263 (S.D. Miss. 1991).

659. *Id.* at 1265.

660. *Id.* at 1265-66.

661. *Id.* at 1267.

662. *Lewis v. Bice*, No. 96-D-1739-N, 1997 U.S. Dist. LEXIS 21560 (M.D. Ala. July 30, 1997) (applying virtually the same analysis as in *Boyd*, while criticizing the contrary position as relying on too "literal a reading" of ERISA).

663. *See, e.g., Phoenix Mut. Life Ins. Co. v. Adams*, 30 F.3d 554, 562-64 (4th Cir. 1994) (explaining that federal common law does permit prevailing state law, even if preempted, to be used to establish federal common law, but only if

Federal common law may not be used to revise ERISA is applicable and determinative. In particular, ERISA requires that plan benefits be determined only by plan terms. Finally, in 1981, the Supreme Court held in *Ridgway*, that a federal statute with a similar Benefit Plan Terms Mandate preempted a similar state divorce decree provision pertaining to a life insurance designation.⁶⁶⁴

The Eighth Circuit reached a similar decision four years later in *Equitable Life Assurance Society v. Chrysler*,⁶⁶⁵ when it remanded a case to determine under state law principles whether a former wife was entitled to 45,000 dollars in proceeds from an employer life insurance plan. The participant agreed to designate his former wife as the irrevocable beneficiary of such life insurance as long as he had an alimony obligation to his former wife, but his widow as the designee at his death when he still had the alimony obligation. The Court declared that the Anti-Alienation Prohibition didn't apply to welfare plans, and thus didn't preempt state court orders pertaining to welfare plans.⁶⁶⁶ The Court further declared that the Eighth Circuit had previously held that the ERISA Explicit Exemption does not entirely preempt the effect of divorce decrees on a welfare plan's beneficiaries.⁶⁶⁷ It then concluded that ERISA is silent on how to resolve a dispute between benefit claimants. Thus federal common law applies, which in this case reduces to state law determinations because once the plan interests have been protected by interpleader traditional state law principles may be applied.⁶⁶⁸ However, the Supreme Court in *Egelhoff* resolved a beneficiary dispute by holding that state law with respect to life insurance beneficiary designations was preempted because it attempted to override plan terms. Thus, the divorce decree would be preempted in this case and the widow (the participant's designee) would be entitled to all the insurance proceeds.

The Sixth Circuit reached a somewhat different decision five years later in *Central States Pension Fund v. Howell*,⁶⁶⁹ when it remanded a case to determine under state law principles whether a wife was entitled to impose a constructive trust on the 30,000 dollars in proceeds from an employer life insurance plan that had been paid to the participant's children whom he had designated as

that law does not modify the terms of an ERISA plan but instead helps interpret those terms such as with the substantial compliance doctrine discussed, *supra*.

664. 454 U.S. 46 (1981).

665. 66 F.3d 944 (8th Cir. 1995).

666. *Id.* at 947-48.

667. *Id.* at 948-49. The reference was to *Lyman Lumber*, 877 F.2d 692, discussed *infra*.

668. *Id.* at 949-50.

669. 227 F.3d 672 (6th Cir. 2000).

plan beneficiaries. The participant had disregarded an order not to dispose of any of his property during the pendency of a divorce. He also died during the pendency. The Court agreed that the order was not a QDRO, although in accord with *Metropolitan Life Insurance v. Marsh*,⁶⁷⁰ it presumed that QDROs were applicable to welfare plans. The court then concluded that under the Benefit Plan Terms Mandate the proceeds were payable to the designated beneficiaries. However, the court concluded that a constructive trust could be imposed against the proceeds after their distribution if the equities required it. The court relied on two Supreme Court decisions, neither of which dealt with beneficiary designations or considered the Benefit Plan Terms Mandate. First, in *Mackey v. Lanier Collection Agency*,⁶⁷¹ the Supreme Court had permitted the garnishment of welfare benefits. In *Guidry v. Sheet Metal Workers National Pension Fund*,⁶⁷² the Court had characterized a constructive trust remedy different from the garnishment one under consideration as preempted by the Anti-Alienation Prohibition. The court, however, observed that the Tenth Circuit held that ERISA did not prohibit a constructive trust of the kind under consideration to be imposed on the *Guidry* pension proceeds after their distribution.⁶⁷³ Thus, the court argued a constructive trust was permitted to be imposed in this case.⁶⁷⁴ However, the court failed to consider *Boggs*,⁶⁷⁵ in which the Supreme Court rejected the availability of constructive trust to effectuate an indirect benefit claim.⁶⁷⁶

A district court reached a similar result five years later in *Irwin v. Principal Life Insurance Co.*, when it imposed a constructive trust in favor of the participant's spouse against the participant's father (and designee) who received \$172,000 in proceeds from an employer life insurance plan.⁶⁷⁷ " The decision

670. 119 F.3d 415 (6th Cir. 1997).

671. 486 U.S. 825 (1988).

672. 493 U.S. 365 (1990).

673. *Guidry*, 39 F.3d 1078 (finding that state law prevented the imposition of a constructive trust).

674. *See also* *Emard v. Hughes Aircraft Co.*, 153 F.3d 949 (9th Cir. 1998) (making similar constructive trust arguments to try to distinguish *Boggs* but overruled by *Egelhoff*).

675. 520 U.S. 833 (1997).

676. *See id.* (Supreme Court rejecting not only rejected a constructive trust or a claim for a payment from funds other than the pension benefits, but even the request for an accounting from the plan of what the parties entitled to benefits had received from the plan).

677. No. 04-4052-JAR, 2005 U.S. Dist. LEXIS 34077 (D.C. Kan. Dec. 16, 2005). *But see* *In the Matter of Margaret M. Tomeck*, 872 N.E.2d 236 (2007) (holding that the anti-assignment provisions of the Social Security Act discussed *supra*, did not prohibit a local social services department from attributing the social security payments to a disabled individual to the individual's spouse in order to determine the spouse's apparent liability for

was based on the fact that the participant had disregarded a temporary restraining order not to dispose of assets during the pendency of a divorce action. The participant changed beneficiaries and died during the pendency of the action. The court first applied *Egelhoff* to hold that the father was entitled to the life insurance proceeds unless the QDRO exclusion from the Explicit Preemption applied.⁶⁷⁸ As in *Central States Pension Fund v. Howell*, the court first checked whether the order was a QDRO and found that it lacked the requisite specificity after determining that QDROs applied to welfare plans by citing *Carland*.⁶⁷⁹ However, the court disregarded the *Egelhoff* rejection of constructive trusts, as that decision's title shows, and merely cited *Howell* for the principle that under the doctrine of undue enrichment a constructive trust should be imposed against the father's proceeds.⁶⁸⁰

XI. THE LOWER COURTS DISREGARD THE ANTI-ALIENATION
PROHIBITION AND WRONGFULLY OVERRIDE BENEFICIARY
DESIGNATIONS WHEN THE DESIGNATED BENEFICIARY "WAIVED"
SURVIVOR BENEFITS FROM PENSION PLANS

The Anti-Alienation Prohibition prohibits the alienation or assignment of pension plan benefits. Benefits of both participants and beneficiaries are protected.⁶⁸¹ There is no exception if the participant obtains consideration for the alienation, as generally occurs with respect to marital dissolutions. The Supreme Court held in 1990 in *Guidry v. Sheet Metal Workers National Pension Fund*,⁶⁸² that there are no equitable exceptions to this prohibition.⁶⁸³ Thus, an agreement by a designated beneficiary to waive his or her rights to pension benefits, which is not part of a QDRO may not thereby give any other party the right to receive a designee's benefits either directly from the plan or indirectly from the designees.⁶⁸⁴

On the other hand, three circuits⁶⁸⁵ and several state courts⁶⁸⁶

payments that the department had made on behalf of the individual).

678. *Id.* at *21-34.

679. *Id.* at *34-42.

680. *Id.* at *42-49.

681. *See generally* Treas. Reg. § 1.401(a)-13(c)(1) (2005).

682. 493 U.S. 365 (1990).

683. *Id.* at 369-70.

684. Waivers by beneficiaries are usually part of QDROs because QDROs generally make alternate payees beneficiaries. ERISA § 206(d)(3)(B)(i)(I), 29 U.S.C. § 1056(d)(3)(B)(i)(I) (2000).

685. *Lyman Lumber Co. v. John Hill*, 877 F.2d 692 (8th Cir. 1989); *Fox Valley Pension Fund v. Brown*, 897 F.2d 275 (7th Cir. 1990); *Altobelli v. IBM Corp.*, 77 F.3d 78 (4th Cir. 1996).

686. *See, e.g., Strong v. Omaha Construction Co. Pension Plan*, 701 N.W.2d 320 (2005); *Silber v. Silber*, 99 N.Y.2d 395 (2003); *Keen v. Weaver*, 121 S.W.3d

have held before and after *Guidry* that beneficiaries had effectively waived their entitlements to ERISA pension plan benefits. A consistent pattern is repeated. The divorce decree provides that the participant's spouse has no interest in the participant's pension plan benefits. The participant's pre-divorce benefit designation of his former spouse is unchanged at his or her death. The courts apply "federal common law" to determine whether the decree, or the agreement incorporated in the decree, alienates the beneficiary of her plan interest. The Eighth Circuit, allows such waivers in theory, but held that all three that were presented to the Circuit lacked the requisite specificity.⁶⁸⁷ Under this reasoning, QDROs would only be applicable to those DROs that result from courts resolving domestic relations disputes rather than ratifying voluntary agreements. Such voluntary agreements would not have to meet QDRO standards. This contradicts the QDRO provisions, which contain no such distinction.

The Eighth Circuit in 1989 in *Lyman Lumber v. John Hill*,⁶⁸⁸ was the first to find that such waivers could be effective, although in that case the waiver was found to be ineffective. The divorce decree stated⁶⁸⁹ that the participant "shall have as his own, free of any interest of [Colleen, his spouse], his interest in the profit-sharing plan of his employer."⁶⁹⁰ The participant died eighteen months later without changing his primary beneficiary, Colleen, or his contingent beneficiaries, his parents and brother. The Court first incorrectly asserted that none of ERISA's explicit provisions addressed the issue. Like the court did in *Central States Health & Welfare Fund v. Boyd*,⁶⁹⁰ it did not consider the Plan Terms Benefit Mandate and thus its reasoning is flawed. The court then appealed to federal common law and engaged in circular reasoning. The Court considered how state courts had decided the effectiveness of state decrees in non-ERISA cases in which such provisions of the decree were not preempted.⁶⁹¹ The court then asserted that a divorce decree could divest a beneficiary of her ERISA rights if the divestiture were sufficiently specific.⁶⁹² Reference was made to a number of non-ERISA holdings and the lower court decision in *Fox Valley Pension Fund*. However, the

721 (2003).

687. *Hill v. AT&T Corp.*, 125 F.3d 646 (8th Cir. 1997).

688. 877 F.2d 692 (8th Cir. 1989).

689. *Id.* at 693.

690. 762 F. Supp. 1263 (S.D. Miss. 1991).

691. *Lyman Lumber*, 877 F.2d at 693. There is a reference to the lower court decision in *Fox Valley Pension Fund v. Brown*, 897 F.2d 275 (7th Cir. 1990); *Prudential Ins. Co. of America v. Cooper*, 666 F. Supp. 190, 192 (D. Idaho 1987) (involving a similar issue pertaining to employer life insurance but never mentioning the relevance of ERISA or the Explicit ERISA Preemption).

692. *Lyman Lumber*, 877 F.2d at 693.

court found the waiver ineffective because the language established the participant's ownership in the pension benefits but not the divestiture.⁶⁹³

The Seventh Circuit, the next year in *Fox Valley Pension Fund v. Brown*,⁶⁹⁴ was the first to find that such a waiver was effective even though the participant continued to live together with his former spouse (his designee) after the divorce. The divorce decree provided:

The parties each waive any interest or claim in and to any retirement, pension, profit-sharing and/or annuity plans resulting from the employment of the other party.⁶⁹⁵

The participant died nine months after the issue of such decree without having changed his primary beneficiary, Laurine, his former wife, or his contingent beneficiary, his mother. All parties agreed that the decree was not a QDRO.⁶⁹⁶ The court asserted that a beneficiary's waiver was not an assignment or alienation of benefits.⁶⁹⁷ The court asserted that ERISA permits beneficiary waivers and pointed to spousal survivor consents.⁶⁹⁸ However, waivers not satisfying those statutory conditions are not effective.⁶⁹⁹ Thus, the presence of such an ERISA explicit waiver provision implies other waivers are not permitted. The court then asserted that Congress only intended to protect participants from the alienation of benefits.⁷⁰⁰ The Supreme Court held that the Anti-Alienation Prohibition applied to beneficiaries in *Boggs*.⁷⁰¹ The court then asserted that the spouse could have protected her survivor benefits with a QDRO or a post-divorce designation.⁷⁰² While true, ERISA does not require such actions, thus the designation remains effective. The Court distinguished this case from *Lyman* because both parties "signed a voluntary property settlement agreement that included an explicit mutual waiver of any rights each might have had in the other's pension plan."⁷⁰³ However, Treasury Regulation § 1.401(a)-13(c)(1)(ii)⁷⁰⁴ provides

693. *Id.* at 693-94.

694. 897 F.2d 275 (7th Cir. 1990).

695. *Id.* at 277.

696. *Id.* at 278-79.

697. *Id.* at 279.

698. *Id.* at 279; ERISA 205(c)(1)(A); 29 U.S.C. § 1055(c)(1)(A)(i).

699. *See, e.g.,* Hurwitz v. Sher, 982 F.2d 778 (2d Cir. 1992).

700. *Id.* at 279.

701. 520 U.S. 833, 851, 862 (1997).

702. *Fox Valley Pension Fund*, 897 F.2d at 279-80.

703. *Id.* at 280.

704. Under Reorganization Plan Number 4 of 1978, 43 Fed. Reg. 47, 713 (1978) and 29 C.F.R. § 2570.200 a-2, the IRS has the responsibility for establishing the regulations with respect to the prohibition on the assignment or alienation of pension benefits. ERISA § 206(d); 29 U.S.C. § 1056(d) (2000). Those regulations are associated with the similar prohibition in I.R.C.

that an assignment or alienation includes:

Any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become payable to the participant or beneficiary.⁷⁰⁵

In particular, this case reduces to the question, did the participant's mother acquire an interest against the plan enforceable against the plan for the survivor benefit that would have been otherwise payable to the former wife. If so, the decree was an assignment pursuant to the above definition.⁷⁰⁶

The court then asserted since ERISA was silent about the ability to waive a pension interest without a QDRO, it had to look to "federal common law." In particular, the court found that several state courts held that property settlement agreements incorporated into divorce are effective waivers of life insurance benefits if the agreements specifically include a provision terminating the spouse's interest.⁷⁰⁷ In particular, the Court found such a termination of the spouse's pension benefits in the decree.

By contrast, the dissent by Judge Easterbrook in *Fox Valley* cited both the Anti-Alienation Prohibition, which by its own statutory terms applies to beneficiaries, and the Plan Terms Benefit Mandate.⁷⁰⁸ Thus, Judge Easterbrook drew attention to the same flaw that had been present in the federal common law discussion in *Lyman*: There was no ERISA gap for federal common law to fill. Moreover, his dissent concludes⁷⁰⁹ in a manner similar to the Supreme Court explicit deferral to Congressional decisions in *Ridgway* and *Boggs*:

But whether to have rules (flaws and all) or more flexible standards (with high costs of administration and erratic application) is a decision already made by legislation.⁷¹⁰

§ 401(a)(13)(B). Deference is given to authoritative and reasonable interpretations of law by the implementing agency. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

705. *Id.*

706. *See, e.g., McGowan*, 423 F.3d 241 (holding that the Anti-Alienation Prohibition voided a "waiver" by a participant's former wife of her interest in the participant's pension which he was then being paid. The waiver was part of a transaction by which the participant's current wife would be able to obtain the interest). *But cf. Shaver v. Siemens Corp.*, No. 2:02 cv 1424, 2007 U.S. Dist. LEXIS 23578, at *26-27 (W.D. Pa. March 29, 2007) (holding that ERISA permits waivers in unspecified other circumstances, such as in that case where employees gave up claims against the plan).

707. *Id.* at 280-82.

708. *Id.* at 282-84.

709. *Id.* at 284.

710. *Id.*

Judge Ripple in a separate dissent emphasized⁷¹¹ that the court decision would be “a significant impediment to achieving the congressional goal of efficient and certain administration of employee benefit plans.”

The Sixth Circuit in *McMillan v. Parrott*,⁷¹² rejected much of the *Lyman* and *Fox Valley* approach but suggested that under certain circumstances federal common law may be applicable to commitments to make benefit designations.⁷¹³ The settlement incorporated into the divorce decree contained a provision in which each party relinquished “any and all” claims he or she might have against the other.⁷¹⁴ For four years after the divorce the participant stayed on good social terms with his former wife, who he retained as the pension plan beneficiary. The participant died twenty-four hours after another marriage and it was agreed that the new spouse was entitled to the Spousal Survivor interest of half of the participant’s account, but the court held the former spouse was entitled to the other half of the account. The court explicitly disregarded the Anti-Alienation Prohibition because it could simply apply the Plan Terms Benefit Mandate,⁷¹⁵ which would fulfill “the intent of Congress that ERISA plans be uniform in their interpretation and simple in their application.”⁷¹⁶ However, the court stated in dicta that the result would be the same under federal common law because the “waiver” did not refer to the former spouse’s interest in the specific plan.⁷¹⁷

In 1996, the Fourth Circuit, in *Altobelli v. IBM & Prudential Insurance Co.*,⁷¹⁸ joined the Seventh and Eighth Circuits in holding that a beneficiary could effectively waive her pension benefits in a divorce decree. The decree provided that the participant and his spouse, who were both IBM employees, each agreed with respect to the other’s property:

All of the following property is hereafter the sole and exclusive property of the Husband, and the Wife hereby waives and transfers to the Husband any interest that she may have in the property:

711. *Id.*

712. 913 F.2d 310 (6th Cir. 1990). The Sixth Circuit updated these arguments in *Metro. Life v. Pressley*, 82 F.3d 126 (6th Cir. 1996), in which an ERISA life insurance plan benefits were under consideration following a divorce.

713. See also *Cent. States Pension Fund v. Howell*, 227 F.3d 672 (6th Cir. 2000) (invoking the common law to determine the effect of a commitment by the participant to make a benefit designation under both ERISA and non-plans).

714. *McMillan*, 913 F.2d at 311.

715. *Id.* at 311-12.

716. *Id.* at 312.

717. *Id.* It is not clear why the Court made a reference to federal common law which would have no relevance if there was no ERISA gap. *Id.*

718. 77 F.3d 78 (4th Cir. 1996).

* * *

(g) Husband's IBM pension and other deferred compensation plans, if any.⁷¹⁹

The participant's pension plan beneficiary designation of his former wife was unchanged when he died eight years after the divorce. The issue was whether his estate or his former spouse was entitled to the pension plan survivor benefits.

As in the other cases, the *Altobelli* Court began with the assertion that ERISA does not address the effectiveness of waivers in divorce decrees. The Court referred to the *Fox Valley* analysis of the inapplicability of the Anti-Alienation Prohibition to pension plan beneficiaries. In addition, the court cited *Guidry* not for the principle that there are no implicit exceptions to the Anti-Alienation Prohibition but for the principle that beneficiary waivers promote the purpose of the prohibition, namely to "protect a stream of income for pensioners" although the decision never considered such waivers and the pensioner's income stream is not at issue in this case.⁷²⁰ The Court also responded to the Plan Terms Benefit Mandate by asserting that requiring plans to review waivers in divorce decrees is no more burdensome than requiring plans to review potential QDROs which are also "documents outside the plans themselves."⁷²¹ However, ERISA provides that QDROs are beneficiary designations pursuant to the plan terms. There is no similar ERISA provision requiring that waivers in divorce decrees be treated as beneficiary designations. Moreover, *Egelhoff*⁷²² rejected a similar argument when the Supreme Court preempted a state law terminating spousal beneficiary designations on divorce.

The dissent responded by pointing to the clarity of the language of the Plan Terms Benefit Mandate, so that there is no need to analyze the purpose of ERISA to determine the Mandate's meaning or relevance.⁷²³ Moreover, the asserted lack of ERISA guidelines about the required terms of such waivers has led to the very conflicting decisions about the effectiveness of waivers that Plan Terms Benefit Mandate is designed to avoid.⁷²⁴

In *Silber v. Silber*,⁷²⁵ the highest court in New York considered a QDRO which entitled the participant's former spouse to a

719. *Id.* at 80.

720. *Id.* at 81.

721. *Id.*

722. 532 U.S. 141 (2001).

723. *Altobelli*, 77 F.3d at 82.

724. *Id.* at 83. *But see* Mohammed v. Kerr, 53 F.3d 911, 915 (8th Cir. 1995) (claiming no conflict by disregarding the different requirements for specific references to the plan benefits, such as those in *Lyman Lumber*, are required for an effective waiver).

725. 99 N.Y.2d 395 (2003).

separate interest in his pension but also contained the following “waiver:”

All ownership and interest in the balance of the accumulations in all contracts issued by the Pension Plan [TIAA-CREF] will belong to Participant.⁷²⁶

However, in the six months following this execution, the Participant passed away but did not change his designation of the former spouse for the cited contracts.⁷²⁷ The court disregarded the Anti-Alienation Prohibition on the basis that if QDROs are exempt from such prohibition waivers must also be exempt,⁷²⁸ without citing any similar statutory basis for such exemption although it cited the three circuit decisions discussed above. The waiver, unlike the separate interest given to the former spouse under the QDRO portion of the order, may not qualify as a QDRO because QDROs provide benefits to specified individuals other than the participant, called alternate payees,⁷²⁹ but the waiver fails to have such a designation. The Court referred to pre-*Egelhoff* decisions, which disregarded such mandate and concluded:

Strict application of ERISA requirements, while likely serving the ends of uniformity, may not serve the ends of fairness when it comes to effectuating the clear intent of parties to an agreement.⁷³⁰

Similarly, in *Strong v. Omaha Construction Co. Pension Plan*,⁷³¹ the highest court in Nebraska considered a divorce decree that awarded each party ownership of his “retirement plans.” However, in the two years following such divorce the former wife remained the beneficiary. The court made no mention of the Anti-Alienation Prohibition, although it cited the circuit cases described above. Most of its discussion was devoted to a similar discussion of why the Plan Terms Benefit Mandate did not prevent resort to federal common law.

In *Keen v. Weaver*,⁷³² the highest court in Texas considered a divorce decree that awarded the participant’s pension plan to the participant. However, in the thirteen years following such divorce even though the participant married another woman, his first wife remained his primary beneficiary and his mother his contingent beneficiary. The court cited *Lyman, Fox Valley* and *Altobelli* for the proposition that the Anti-Alienation Prohibition was

726. *Id.*

727. *See id.* (explaining that there was no question that the participant’s widow was entitled to the fifty percent spousal survivor’s benefits). The issue was, was she entitled to the other fifty percent of the benefits. *Id.*

728. *Silber*, 99 N.Y.2d at 402.

729. ERISA § 206(d)(3)(C)(i),(ii); 29 U.S.C. § 1056(d)(3)(C)(i),(ii) (2000).

730. *Silber*, 99 N.Y.2d at 403-04.

731. 701 N.W.2d 320 (Neb. 2005).

732. 121 S.W.3d 721 (Tex. 2003).

inapplicable. The Court asserted that provisions other than the Plan Terms Benefit Mandate required plan fiduciaries to look beyond beneficiary designations. QDROs were mentioned, even though ERISA requires that QDROs be treated as beneficiary designations pursuant to plan terms.⁷³³ In addition, waivers of spousal survivor benefits were mentioned, even though ERISA requires that such waivers be treated as performed pursuant to plan terms.⁷³⁴ The Court pointed to no ERISA provision requiring that waivers in divorce decrees be treated similarly. The Court also mentioned *Mackey v. Lanier Collection Agency*,⁷³⁵ which as discussed, did not consider a beneficiary designation, the Plan Terms Benefit Mandate. Reference was also made to Circuit decisions discussed. Thus, again no convincing basis is presented for resorting to federal common law.

The dissent written by Judge Hecht like that by Judge Easterbrook in *Fox Valley Pension Fund* observed that the Plan Terms Benefit Mandate clearly voided the waiver that was part of a state court order.⁷³⁶ Moreover, he asserted that the Supreme Court decision in *Egelhoff*, which preempted a state law trying to alter the payment of plan benefits, cannot be disregarded by characterizing state law as federal common law.⁷³⁷ In exasperation, Judge Hecht wrote:

The obvious weakness in this position is that the Court is unable to supply any reason, real or imagined, why ERISA would explicitly require plans to be administered according to their terms, preempt state law to assure that end, and then reincorporate state law into federal common law so that plans are not administered according to their terms, thereby making the express statutory language simply illusory.⁷³⁸

Judge Hecht observed that the Supreme Court decision in *Egelhoff*, which held that ERISA expressly “governs the payment of benefits, a central matter of plan administration” undermines the premise that ERISA is silent on the permissibility of benefit waivers.⁷³⁹ “Finally, Judge Hecht asks how the court justifies making a voluntary waiver incorporated in a divorce decree enforceable but not a judgment that a spouse is entitled to the same pension plan proceeds.”⁷⁴⁰

733. ERISA § 206(d)(3)(a); 29 U.S.C. § 1056(d)(3)(A) (2000).

734. ERISA § 205(a); 29 U.S.C. § 1055(a) (2000).

735. 486 U.S. 825 (1988).

736. *Keen*, 121 S.W.3d at 728-29.

737. *Id.* at 729-30.

738. *Id.* at 730.

739. *Id.* at 731.

740. See generally *id.* (explaining that the latter would not be a QDRO because it does not meet the QDRO standards, while the former with the same language would be a QDRO because it is a “waiver” which need not meet the QDRO standards). *Id.*

However, in *Kennedy v. DuPont Savings and Investment Plan*, the Fifth Circuit held that the Anti-Alienation Prohibition prohibited waivers by beneficiaries of pension benefits.⁷⁴¹ The court relied on⁷⁴² *Boggs*⁷⁴³ and *McGowan*,⁷⁴⁴ to reject the holding of the Fourth Circuit in *Altobelli* and of the Seventh Circuit in *Fox Valley*, that waivers did not constitute the alienation of benefits. The Court also distinguished the pension benefit waivers that it had previously upheld in *Stobnicki v. Textron, Inc.*,⁷⁴⁵ and *Rhoades v. Casey*.⁷⁴⁶ The court observed that those cases did not involve marital dissolutions, which are at issue in *Kennedy*.⁷⁴⁷ ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3), provides that DROs that are not QDROs are preempted. Thus, the part of DROs, which are not QDROs, but waivers, are preempted.⁷⁴⁸

XII. THE LOWER COURTS DISREGARD THE PLAN TERMS BENEFIT
MANDATE AND WRONGFULLY OVERRIDE BENEFICIARY
DESIGNATIONS WHEN THE DESIGNATED BENEFICIARY "WAIVED"
SURVIVOR BENEFITS FROM LIFE INSURANCE PLANS

The Supreme Court has consistently stressed the importance of the Plan Terms Benefit Mandate. In 1985, it held in *Massachusetts Mutual Life Insurance Co. v. Russell*⁷⁴⁹ that plan administrators have a fiduciary duty to provide participants and beneficiaries "with the benefits authorized by the plan."⁷⁵⁰

In 1995, the Supreme Court stressed the importance in *Curtiss-Wright v. Schoonejongen*⁷⁵¹ of the ERISA requirement that participants and beneficiaries be able to determine their benefits from the written plan documents. In 1997, in *Boggs*, it explicitly held that individuals whose ERISA benefit claim is not based on the plan terms may not obtain the benefits directly from the plan

741. 497 F.3d 426 (5th Cir. 2007) (The DRO constituted a QDRO for certain pension plans and the issue was the effectiveness of a waiver of rights relating to "any retirement plan" associated with the participant's employment).

742. *Id.* at 429-30.

743. 520 U.S. 833 (1997).

744. 423 F.3d 241 (3d Cir. 2005) (holding that the Anti-Alienation Prohibition voided a "waiver" by a participant's former wife of her interest in the participant's pension which he was then being paid. The waiver was part of a transaction by which the participant's current wife would be able to obtain the interest).

745. 868 F.2d 1460, 1465 (5th Cir. 1989).

746. 196 F.3d 592, 598 (5th Cir. 1999).

747. 497 F.3d 426, 430 (5th Cir. 2007).

748. *Id.* at 429-31; see also Albert Feuer, "When Are Releases of Claims for ERISA Plan Benefits Effective?" 38 J. MARSHALL L. REV. 773, 840-43 (2005) (arguing that *Stobnicki* and *Rhoades* are not currently viable).

749. 473 U.S. 134 (1985).

750. *Id.* at 142-43.

751. 514 U.S. 73, 83 (1995).

or indirectly from the participant or beneficiary.⁷⁵² Finally in 2001, in *Egelhoff* it stressed how ERISA expressly “governs the payment of benefits, a central matter of plan administration.”⁷⁵³ Moreover, the court declared that a divorce created no ambiguity in the participant’s designation of his spouse as his beneficiary even if she is described therein as his spouse.⁷⁵⁴ Thus, an agreement by a designated beneficiary to waive his or her rights to life insurance benefits, which is not a plan document or a designation pursuant to plan terms, may not thereby give any other party the right to receive a designee’s benefits either directly from the plan or indirectly from the designee.

Nevertheless five of six circuits⁷⁵⁵ and several state courts⁷⁵⁶ have held before and after *Egelhoff* that beneficiaries had effectively waived their entitlements to ERISA pension plan benefits. The same fact pattern that occurred with pension benefit waivers recurs as do many of the same arguments, and in fact many of the pension waiver decisions are cited. Thus, the analysis will be shorter in this section.

The Fifth Circuit in 1994 in *Brandon v. Travelers Insurance Co.*,⁷⁵⁷ was the first to find that such a waiver was effective even though the participant’s spouse was unrepresented in the divorce and the participant designated her as his beneficiary during the divorce proceedings. The divorce decree provided that the participant’s spouse was “divested of all rights, title, interest, and claim in and to such property . . . or other benefit program existing by reason of Petitioner’s past, present, or future employment.”⁷⁵⁸ The participant died eighteen months after the issue of such decree without having changed his primary beneficiary, his former wife, or his contingent beneficiary, his brother. The court first held that ERISA preempted the Texas law terminating a spousal

752. 520 U.S. 833, 852 (1997).

753. 532 U.S. 141 (2001).

754. *Id.* at 149 n.2.

755. *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321 (5th Cir. 1994); *Mohammed*, 53 F.3d 911; *Altobelli*, 77 F.3d 78 (holding waivers permissible); *Melton v. Melton*, 324 F.3d 941 (7th Cir. 2003). The Sixth Circuit rejected waivers with respect to direct payments from the plan. *Unicare Life v. Craig*, 2005 U.S. App. LEXIS 20687 (6th Cir. Sep. 22, 2005) (permitting a constructive trust in divorces); *see, e.g.*, *Cent. States, S.E. & S.W. Areas Pension Fund v. Howell*, 227 F.3d 672 (6th Cir. 2000) (providing for constructive trusts in divorce agreements). By contrast, asserted waivers in a will have been rejected. *Krishna v. Colgate Palmolive*, 7 F.3d 11 (2d Cir. 1993).

756. *See, e.g.*, *Metrop. Life v. Flinkstrom*, 303 F. Supp. 2d 34, 39 (D. Mass. 2004) (noting an effective waiver); *Moore v. Moore*, 266 Mich. App. 96, 102 (Mich. 2005) (stating that the court was not bound to follow Sixth Circuit precedent); *John Hancock Mut. Life Ins. v. Timbo*, 67 F. Supp. 2d 413, 423 (D.N.J. 1999) (finding decedent’s second wife did waive benefits).

757. 18 F.3d 1321 (5th Cir. 1994).

758. *Id.* at 1323.

designation on divorce.⁷⁵⁹ The Court then had to decide⁷⁶⁰ whether ERISA “resolve[d] the question of how beneficiaries are designated” and decided to rely on the “long and venerable history of Federal respect for state domestic relations law. The court followed the *Lyman* and *Fox Valley Pension Fund* analysis that ERISA provided no answer and thus a voluntary and knowing waiver was permitted, rather than the *McMillan* analysis that asserted that the Plan Terms Benefit Mandate was unambiguous.

The Eighth Circuit in 1995 in *Mohammed v. Kerr*,⁷⁶¹ also found such a waiver was effective against the former wife. In that case the divorce decree only provided that each party was awarded “full right, title, interest and equity in . . . life insurance policies.”⁷⁶² The only alternative to the federal common law of *Lyman* and *Brandon* the court considered was state law because neither party sought relief based on a specific ERISA section. The court seemed less concerned about the nuances of the agreement than the fact that:

Once Kerr was diagnosed with the disease [Alzheimer’s Disease], Mohamed could not get away fast enough, and she never looked back. We do not believe it is putting too fine a point on it to say that she abandoned him to his illness, which yielded the same result.⁷⁶³

This Article addressed the Fourth Circuit *Altobelli* decision in 1996, *supra*.

The Fifth Circuit in 2000 cited *Brandon* in *Manning v. Hayes*,⁷⁶⁴ but presented a more extensive defense of the applicability of federal common law to (A) waivers by beneficiaries of ERISA life insurance benefits, and (B) the resolution of competing benefit claims. However, the court held that the divorce decree did not have a sufficiently specific reference to the ERISA life insurance plan for the decree to constitute an effective waiver by his wife who remained the designee until the participant’s death from pancreatic cancer one month after the divorce. In addition to its reference to its holding in *Brandon*, the court attempted to dismiss the Plan Terms Benefit Mandate as follows:

Section 1104 defines the fiduciary duties owed by the plan administrator to plan participants and beneficiaries. That section does not either expressly or implicitly purport to establish any methodology for determining the beneficiary of an ERISA plan or for resolving competing claims to insurance proceeds. Thus, considered in isolation, § 1104(d) is a very thin reed upon which to find

759. *Id.* at 1325.

760. *Id.* at 1326.

761. 53 F.3d 911, 912-13 (8th Cir. 1995).

762. *Id.*

763. *Id.* at 916.

764. 212 F.3d 866 (5th Cir. 2000).

complete conflict preemption with respect to competing claims to life insurance proceeds.⁷⁶⁵

The Supreme Court in *Egelhoff*, however, described that “thin reed” as follows:

The statute [attempting to determine pension and life insurance beneficiaries following a divorce which the Court is holding to be preempted] thus *implicates an area of core ERISA concern*. In particular, it runs counter to ERISA’s commands that a plan shall “specify the basis on which payments are made to and from the plan,” § 1102(b)(4), and that the fiduciary shall administer the plan “in accordance with the documents and instruments governing the plan,” § 1104(a)(1)(D), *making payments to a “beneficiary” who is “designated by a participant, or by the terms of [the] plan.”* § 1002(8).⁷⁶⁶

The Court did not do much better in its attempt to dismiss *Boggs* because the decision was concerned only with pension benefits and community property rights.⁷⁶⁷ The court apparently missed the *Boggs* explanation of why the claimants had no right to obtain the benefits indirectly from either the participant or his designee:

If state law is not pre-empted, the diversion of retirement benefits will occur regardless of whether the interest in the pension plan is enforced against the plan or the recipient of the pension benefit.⁷⁶⁸

This was not a reference to either the Anti-Alienation Prohibition or the Spousal Survivor Provisions but to the “thin reed” of the Plan Terms Benefit Mandate.

The Seventh Circuit in 2003 in *Melton v. Melton* decided that waivers were available under federal common law.⁷⁶⁹ The divorce agreement included a blanket revocation of the respective interests of the two parties in all financial and property rights arising “by reason of their marital relation” and “any asset assigned to a party by this agreement” including “annuities, life insurance policies,” and other financial instruments. The participant died six months after the divorce without changing his designation of his former spouse. The child of an earlier marriage claimed she was entitled to the proceeds because she claimed that the former wife had waived her plan interest, and the participant was obligated under the earlier divorce of her mother to name her as the beneficiary. First the court applied *Egelhoff* to find correctly that the daughter’s constructive trust claim under the first divorce agreement, which arose under Illinois law was

765. *Id.* at 872 (emphasis added).

766. 532 U.S. 141, 147 (2001) (emphasis added).

767. *Manning*, 212 F.3d at 872-73.

768. 520 U.S. 833, 853 (1997).

769. 324 F.3d 941 (7th Cir. 2003).

preempted.⁷⁷⁰ The court then observed it had “noted in Fox Valley that ERISA is silent on the issue of what constitutes a valid waiver of interest and we therefore turned to federal common law and Illinois state law to fill the gap.” It did not consider whether *Egelhoff* precluded waivers by designees, when the waivers were not prepared pursuant to plan terms. The Court then reviewed the waiver to determine whether it was explicit, voluntary and knowing. It held that the waiver was ineffective because of a lack of an express reference to the employee group term life insurance plan.⁷⁷¹

Finally, the Fifth Circuit attempted to deal with the impact of *Egelhoff* in *Guardian Life v. Finch*,⁷⁷² and it was no more successful than it had been with *Manning*. The voluntary agreement incorporated into the divorce decree provided that the participant would be entitled to his insurance policies and the former spouse would be divested of her interest in those policies. The participant died six months later intestate in an aircraft accident without having changed the designee of his employer life insurance policy (his former spouse). The sole issue for appeal was whether *Egelhoff* required the Fifth Circuit to change its federal common law approach. The court concluded that the approach was still valid. Under that approach the former spouse’s waiver was effective and thus his intestate heirs were entitled to the proceeds of the life insurance.

The court first observed that the Supreme Court did not address the applicability of federal common law to ERISA Plans, but rather whether ERISA preempts state statutes which attempt to change ERISA Plan beneficiaries following divorce.⁷⁷³ Second, the court asserted that the Supreme Court never held that federal common law would threaten uniformity and it may promote such uniformity. Third, the court asserted that the Supreme Court suggested that a common law approach may be appropriate in slayer cases where a designee slays the participant. Finally, the Court cited a number of post-*Egelhoff* decisions that adhered to the federal common law analysis of beneficiary waivers.

The court’s approach is flawed. The Supreme Court implicitly addressed and rejected the applicability of federal common law to determining whether beneficiary waivers in divorce agreements are effective. The Supreme Court, unlike the court in *Manning v. Hayes*,⁷⁷⁴ did not merely state that the state statute was related to ERISA and thus preempted by the ERISA Explicit Exemption.

770. *Id.* at 945.

771. *Id.* at 945-46.

772. 395 F.3d 238 (5th Cir. 2004).

773. *Id.* at 242.

774. 212 F.3d 866, 870 (5th Cir. 2000).

First, as discussed, the Supreme Court held in *Egelhoff*,⁷⁷⁵ that the Plan Terms Benefit Mandate is part of an area of a core ERISA concern. Thus, ERISA is far from silent in determining who is to be paid life insurance proceeds. Rather, ERISA “commands” that payment be made to the designee under the plan terms.⁷⁷⁶ Furthermore, the Supreme Court also held that there was no ambiguity about a participant designation of a spouse if the designation was silent about the effect of a divorce of the participant and the spouse. Therefore, federal common law is not needed to bridge any ERISA gap. In fact, under the Plan Terms Benefit Mandate and the *Mertens* command that federal common law may not revise ERISA pension plans are prohibited from considering any non-plan documents, such as the beneficiary waivers at issue, which the plan terms do not reference.

XIII. THE LOWER COURTS WRONGFULLY OVERRIDE BENEFICIARY DESIGNATIONS WHEN THE DESIGNEE KILLED THE PARTICIPANT

The lower courts have regularly revoked ERISA beneficiary designations when the person designated to receive a participant’s survivor benefits kills the participant. The Supreme Court in 2001 in dicta in *Egelhoff*,⁷⁷⁷ declined to address the implications of its holding for such cases. The Court described “slayer” statutes, which override designations in such cases, as having been⁷⁷⁸ “adopted in almost every state,” and as “more or less uniform,” but not before the Court. The Court had also expressly declined to address the same issue in 1981 in *Ridgway*,⁷⁷⁹ when it held that state court orders directing a participant to designate a specified beneficiary for life insurance provided to servicemen pursuant to a federal statute were preempted. However, the *Egelhoff* dissent correctly observed that under the reasoning of the Court’s holding that ERISA preempted state laws that revoked spousal designations upon divorce, state slayer laws are similarly preempted by the ERISA Explicit Exemption.

The courts often assert ERISA does not preempt state slayer laws and use state slayer laws to override beneficiary designations, which, because the killer is often the participant’s spouse, are often the ERISA Marital Survivor Beneficiary Designation. As discussed above, this reasoning is faulty because under the principles set forth in *Egelhoff* such state laws “relate to ERISA plans” and are thus preempted by the ERISA Explicit Preemption.⁷⁸⁰

775. 532 U.S. 141 (2001).

776. *Id.* at 147.

777. *Id.* at 152.

778. *Id.*

779. 454 U.S. 46, 60, n.9 (1981).

780. *Id.*

The lower courts also assert that federal common law includes the state slayer law principles which they then apply to ERISA plans. This reasoning is also flawed because, as the Supreme Court stated in *Mertens*, federal common law is “not the authority to revise the text of” ERISA. Congress and the ERISA regulations carefully delineated conditions under which the ERISA Marital Survivor Beneficiary Designation is established and may be changed. Neither the law nor the regulations mention a slayer exception. Congress and the ERISA regulations carefully delineate conditions under state court orders constitute beneficiary designations, namely when such orders are QDROs. Neither the law nor the regulations mention a slayer exception. Under certain limited circumstances criminal laws, which may include provisions for restitution as well as for punishment,⁷⁸¹ may affect beneficiary designations. However, none of the slayer overrides are based on criminal law provisions that pertain to beneficiary designations. The Plan Terms Benefit Mandate, requiring that plan benefits be determined by plan terms, includes no reference to slayer principles. Thus, there is no gap in ERISA with respect to slayer principles for federal law to fill and thus the principles are inapplicable.

The Supreme Court stated:

One of the principal goals of ERISA is to enable employers “to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.”⁷⁸²

In the slayer area there would be a particular need for Congress to carefully delineate the terms by which beneficiary designation would be modified because of the substantial variances among the various state slayer laws.⁷⁸³ There are inconsistencies with respect to (A) the kind of killings which revoke ERISA plan designations; (B) the kind of proof needed to

781. See, e.g., Robert Dieter, *Restitution in Criminal Cases*, 30 COL. LAWYER 125 (Oct 2001); Mandatory Victims Restitution Act of 1996 (“MVRA”), Pub. L. No. 104-132, 110 Stat. 1227. Generally applicable criminal laws are excluded from the Explicit ERISA Exemption. ERISA § 514(b)(4); 29 U.S.C. § 1144(b)(4) (2000); see also *United States v. Novak*, 476 F.3d 1041 (9th Cir. 2007) (the United States awarded entitlements of a pension plan participant who stole from his employer and was required to make restitution under the MVRA).

782. *Egelhoff*, 532 U.S. at 148 (citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987)).

783. *Id.* at 159-60 (dissent observing the difference in the standards of proof applicable to the requisite killing criteria); *Ahmed v. Ahmed*, 817 N.E.2d 424, 430-32 (Ohio Ct. App. 2004); see also Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489 (1986) (proposing a model statute to help courts determine beneficiary designation to supplement confusion caused by variations in state slayer statutes).

establish such killings; (C) the effect of criminal and civil trial verdicts; and (D) the designation that supersedes the revoked designation of the killer. The lack of such consensus implies that any attempt to fashion federal common law set of slayer principles would generate a set of inconsistent rules, as is occurring with different court decisions in this area.⁷⁸⁴

The Supreme Court holding in 1886 in *New York Mutual Life Insurance Co. v. Armstrong*⁷⁸⁵ is often cited for the common law statement, “[i]t would be a reproach to the jurisprudence of the country, if on[e] could recover insurance money payable on the death of a party whose life he had feloniously taken.”⁷⁸⁶ The Court did not consider a federal statute or which beneficiary was entitled to receive the insurance proceeds. The Court decided an unrelated issue, whether there was an insurance contract when “insurance” was purchased with the intent to immediately murder the insured. The policy was purchased on December 12, 1887 and the insured was murdered on January 25, 1878.⁷⁸⁷ The Court held that under these circumstances there was no insurance contract and thus no one, including the surviving spouse who had no apparent role in the murder, was entitled to any insurance proceeds.⁷⁸⁸

The New York Court of Appeals holding in 1889 in *Riggs v. Palmer* is often cited for the common law maxim, “No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.”⁷⁸⁹ Such maxim is described as having been applied by the Court of Appeals of New York in *Armstrong*.⁷⁹⁰ The court was again not considering the significance of a federal statute, but rather the applicability of New York State common law to the New York State’s testamentary statute, which generally required adherence to the terms of a valid will, such as in this case. In particular, was a sixteen-year-old who murdered his grandfather entitled to the residue of the grandfather’s testator’s estate, subject to the support of his mother,⁷⁹¹ as provided in the grandfather’s will? The court decided that the grandson was not entitled to the residue and thereby modified the

784. *But cf.* David S. Lebolt, *supra* note 14 (proposing a federal common law approach which appeals to prevailing national standards, such as the various Restatements of law, rather than the principles of the diverse and preempted state laws). The difficulty with this approach is that it fails to recognize the lack of consensus among the different states about application of the aspirational Restatement principles. *Id.*

785. 117 U.S. 591, 600 (1886).

786. *Id.*

787. *Id.* at 592.

788. *Id.* at 598.

789. 22 N.E.2d 188, 190 (1889).

790. *Id.*

791. *Id.* at 188.

will's beneficiary designation.⁷⁹² The court held that it did not have to follow the "letter of the law" that the terms of a valid will are binding because:

It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers.⁷⁹³

The dissent questioned the application of this rule and whether the court's decision was consistent with the legislature's intention.⁷⁹⁴ Would the decedent and the legislature have wished the court to change the disposition of his assets in the manner that the court chose? Would the legislature have wished the court to change the testamentary disposition in the slayer situation but not in other circumstances in which clear manifestations of testators' preferred disposition of his assets were disregarded because the formalities of a will revocation or execution were not observed? Neither the majority nor the dissent discussed a 1884 case in which the same court applied equitable principles to modify a will beneficiary designation indirectly. In *In the Matter of the Probate of the Will of Mary O'Hara*,⁷⁹⁵ the Court had upheld simple bequests to three professional advisors of the decedent, but imposed a constructive trust in favor of the decedent's distributees because

Equity acts in such case not because of a trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which alone he procured the devise and bequest, is to perpetrate a fraud upon the deviser which equity will not endure.⁷⁹⁶

In that case, the bequests were made to permit the decedent to avoid the rule against perpetuities with respect to a desired perpetual gift of income to charities. This intention was set forth in a letter, showing that the advisors solicited the bequests for this purpose. The trust was imposed in favor of the distributees rather than the charities because the court would not permit the testator to avoid the rule against perpetuities in this manner. By contrast, in 1897 the Court⁷⁹⁷ imposed a constructive trust in favor of the

792. The Court apparently allocated the grandson's residuary share in accord with the rules of intestacy subject to the support of the killer's mother. By contrast, in *In re Estate Covert*, 2761 N.E.2d 571 (N.Y. 2001), the court was able to avoid intestacy and use the residuary clause of a testator's will to provide the killer's share to the killer's parents.

793. 22 N.E.2d 188, 189 (1889).

794. *Id.* at 191-93.

795. 95 N.Y. 403 (1884).

796. *Id.* at 413.

797. A more complete discussion of the conditions under which such "secret

charities, twenty colleges, when the purpose of the specific bequests was to avoid the limitation on testamentary transfers to charities.⁷⁹⁸ There was a vigorous debate whether a release by the surviving spouse and children made such a disposition permissible under the law.

By contrast, the Supreme Court has held repeatedly, *supra*, that equitable principles may not be used to modify plan beneficiary designations pursuant to federal statutes. ERISA prohibits both direct modifications, as in *Riggs v. Palmer*, which determine who initially receives the benefits and indirect modifications, as with constructive trusts, which determine who may keep or use the plan benefits.

In 1989, the first ERISA slayer decision was issued in the Eastern District of New York in *Mendez-Bellido v. Trustees of ATU Pension Fund*.⁷⁹⁹ The participant's surviving spouse was found not entitled to the statutory survivor benefits from a pension plan because she had pled guilty to second-degree manslaughter, which is a reckless but unintentional killing.⁸⁰⁰ The court lacked sufficient information to decide who was entitled to the proceeds.⁸⁰¹ The court extended the *Riggs v. Palmer* principles to pension plans; those principles had been previously applied only to insurance plans and wills.⁸⁰² The court did not discuss the fact that the court was overruling a designation set forth by Congress for spousal survivor benefits that had nothing to do with the intention of the participant.⁸⁰³

The *Mendez-Bellido* court held that the New York common law was not preempted by ERISA because the uniformity of state slayer laws prevented the creation of a patchwork scheme of

trusts" are imposed may be found in Eric W. Penzer and Frank T. Santoro, "Use of the "Secret Trust" Doctrine to Effectuate a Decedent's Intent," NYSBA Trusts and Estates Newsletter, 3 (Spring 2007). See also *In the Matter of Voice*, 238 N.Y.S.2d 736 (1963) (discussing the distinction between representations by the beneficiaries and those by the fiduciaries named under the will).

798. *The Trustees of Amherst College v. Thomas G. Ritch*, 45 N.E. 876 (1897). See also *Sharp v. Kosmalski*, N.E.2d 721 (1976), (holding that a constructive trust was imposed on a well-educated woman who obtained a widower's property by breaching a trusting relation). The court listed the following traditional four requirements for the imposition of a constructive trust: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment. *Id.* at 721, 723.

799. 709 F. Supp. 329 (E.D.N.Y. 1989).

800. *Id.* at 330.

801. *Id.* at 333-34.

802. *Id.* at 330.

803. 482 U.S. 1 (1987); see also Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 534-38 (1986) (discussing the application of the slayer principles when the person slain does not control the disposition of the property).

regulation mentioned by the Supreme Court in *Fort Halifax Packing Co. v. Coyne*.⁸⁰⁴ However, the ERISA Explicit Exemption applies to any state laws that relate to ERISA plans. There is no exemption for uniform state statutes, such as all state statutes which require adherence to state court orders which are preempted. Moreover, the state slayer laws differ dramatically. For example, in Colorado, Connecticut and Illinois, the beneficiary designation at issue would not have been revoked because in those states manslaughter, unlike murder, does not affect the participant's designation. Those state legislatures thought it inappropriate to deprive a designee of survivor benefits of survivor benefits if the designee killed the participant without the intent to kill the participant. The court made no apparent attempt to seek a consensus on slayer principles needed to establish federal common law.

Next, the court claimed federal law is in accord with the result⁸⁰⁵ and cited *Prudential Insurance v. Tull*,⁸⁰⁶ in which the Fourth Circuit upheld a judgment awarding life insurance proceeds under the federal Servicemen's Group Life Insurance Act of 1965 ("SGLIA"), to the participant's stepchildren in accord with his default designation. In *Tull*, the participant's widow, who was his designee, had murdered the participant on their wedding night. The court therein based its decision on the equitable principle, "No person should be permitted to profit from his own wrong."⁸⁰⁷ The court did not consider the effect of the Supreme Court decision *Ridgway*,⁸⁰⁸ although the court cited it.⁸⁰⁹ In *Ridgway*, the Supreme Court declined to apply equitable principles against a serviceman who disregarded a court order to name his children the beneficiary of his servicemen's life insurance policies. Moreover, *Tull* was not considering whether to revoke a statutory spousal beneficiary designation as in *Mendez-Bellido*. Four years later, in *Connecticut General Life Insurance Co. v. Cole*,⁸¹⁰ the Southern District of New York cited *Mendez-Bellido* for the principle that the New York slayer law was applicable to an ERISA life insurance plan.⁸¹¹

804. 482 U.S. 1 (1987).

805. *Mendez-Bellido*, 709 F. Supp. at 332.

806. 690 F.2d 848 (4th Cir. 1982).

807. *Id.* at 849.

808. 454 U.S. 46 (1981).

809. 690 F.2d at 849, n.2.

810. 821 F. Supp. 193 (S.D.N.Y. 1993).

811. *Id.* at 198. In this case the ERISA Marital Survivor Beneficiary Designation was not an issue because the plan was not a pension plan. The ERISA Explicit Exemption remained an issue, as did the existence of an ERISA gap. If there is no gap, federal common law is inapplicable.

In 1991 the Eastern District of Louisiana in *New Orleans Electrical Pension Fund v. DeRocha*⁸¹² issued the second ERISA slayer decision. The participant's surviving spouse was found not entitled to the statutory survivor benefits from a pension plan because she had pled guilty to manslaughter, for which she was given five years probation. The participant's divorced spouse who had continued as the participant's explicit designee was held to be entitled to the survivor benefit. The court cited with approval *Mendez-Bellido* and its reference to the federal common law that prevents "a beneficiary convicted of murdering the insured . . . from receiving the insurance proceeds," although as in that case the designee had not been convicted of murder.⁸¹³ The Court applied a local statute applying to insurance, which it claimed was needed to apply guidance where ERISA was silent.⁸¹⁴ Rather than concluding that the absence of any reference to slayer principles in the ERISA Marital Survivor Beneficiary Designation meant they were inapplicable, the court concluded the absence established an implicit exception. The equity of applying the slayer principles in this case is quite questionable. Not only did the manslaughter plea show a lack of intent to kill, but the limitation of the spouse's criminal punishment to probation suggests that her conduct was not very blameworthy.

A year later in 1992 the same court cited *DeRocha* and *Mendez-Bellido* in support of the same conclusion in *New Orleans Electrical Pension Fund v. Newman*.⁸¹⁵ That case also did not involve a murder but apparently a more blameworthy widow and designee. She was sentenced to fifteen years in prison for manslaughter and admitted in a probate filing she was an "unworthy heir." The participant's estate was provided with the survivor benefits from the pension plan because there did not appear to be a contingent beneficiary. The court made misleading references to the case law. In *Ridgway*,⁸¹⁶ the Supreme Court did not hold that state slayer laws do not conflict with federal law, let alone whether they are preempted by ERISA.⁸¹⁷ In *Guidry v. Sheet Metal Workers National Pension Fund*,⁸¹⁸ the Supreme Court did not find that the Anti-Alienation Prohibition is inapplicable to beneficiaries or that the Anti-Alienation Prohibition is only available to blameless individuals.⁸¹⁹ The Supreme Court rather

812. 779 F. Supp. 845 (E.D. La. 1991).

813. *Id.* at 850.

814. *Id.* at 850, n.6.

815. 784 F. Supp. 1233 (E.D. La. 1992).

816. 454 U.S. 46 (1981).

817. *New Orleans Elec. Pension Fund*, 784 F. Supp. at 1236.

818. 493 U.S. 365 (1990).

819. *But see* Charles T. Caliendo, *Removing the "Natural Distaste" from the Mouth of the Supreme Court with a Criminal Fraud Amendment to ERISA's Anti-alienation Rule*, 68 ST. JOHN'S L. REV. 667, 716-18 (1994) (supporting the

held that there are no equitable exceptions to the Anti-Alienation Prohibition, even if an individual has engaged in criminal conduct. Moreover, in *Boggs*,⁸²⁰ the Supreme Court later held that the Anti-Alienation Prohibition applies to beneficiaries. Thus, the prior Supreme Court case law does not show that the Louisiana state law was not preempted by either (A) the ERISA Explicit Preemption, or (B) the Anti-Alienation Prohibition.⁸²¹

In 1998, in *Addison v. Metropolitan Life Insurance*, the Western District of Virginia became the first federal court to consider in detail the applicability of slayer principles to ERISA life insurance plans and murderers.⁸²² The children of the participant and her spouse, her sole designee and convicted murderer, were held to be entitled to the life insurance proceeds. After stating that it was unclear if ERISA preempted the Virginia state law,⁸²³ the court turned to federal common law because the court asserted that “no specific statutory provision in ERISA addresses this question (the applicability of slayer principles).”⁸²⁴ The court stated that federal courts have “consistently held that, as a matter of federal law, a beneficiary convicted of murdering the insured is precluded from recovering the insurance proceeds.”⁸²⁵ This was followed by a string cite including *Newman*, *DeRocha* and several non-ERISA cases and a reference to the Supreme Court 19th century decision in *Armstrong*.⁸²⁶ The *Tull* case is cited for its quote from a 1950 case that “[n]o person should be permitted to profit from his own wrong.”⁸²⁷ The court did not consider *Ridgway*, in which the Supreme Court permitted the participant to benefit from his wrong of not naming his children as the beneficiary of his life insurance policy under the law at issue in *Tull*. The court dismissed the fact that insurance is controlled by ERISA rather than the SGLIA as “a distinction without a difference.”⁸²⁸ There was no consideration of why ERISA does not include any limitations on benefits designations other than the

Newman court analysis).

820. 520 U.S. 833, 865 (1997).

821. As discussed, *supra*, an agreement by the designee to waive such benefits may violate the Anti-Alienation Prohibition.

822. 5 F. Supp. 2d 392, 395 (W.D. Va. 1998). The similar earlier decision of the S. Dist. of N.Y. in *Conn. Gen. Life Ins. Co. v. Cole*, 821 F. Supp. 193, 198, n.10 (S.D.N.Y. 1993) was supported with a very brief reference to *Mendez-Bellido*.

823. The statute in question, VA. CODE ANN. §§ 55-401-15 (West 2006), was part of the Virginia property and conveyance law. It was not a criminal law that was exempt from the ERISA Explicit Preemption.

824. *Addison*, 5 F. Supp. 2d at 393.

825. *Mendez-Bellido*, 709 F. Supp. at 332-33.

826. *Id.*

827. *Addison*, 5 F. Supp. 2d at 394.

828. *Id.*

two statutory beneficiary designations and the criminal law exclusion from the Explicit ERISA Preemption.

There were three post-*Egelhoff* decisions from district courts in the Fifth Circuit. In 2002 in *H.E.B. Investment and Retirement Plan v. Harris*,⁸²⁹ the participant's widow and sole designee of the participant's pension survivor benefits who pleaded guilty to the "manslaughter/murder" of the participant was found not entitled to those benefits. Instead, the children of the participant and spouse were found entitled to those benefits. The court described *Egelhoff* as "hinting" that slayer laws were not preempted.⁸³⁰ It referred to the pre-*Egelhoff* decision, *Manning v. Hayes*,⁸³¹ discussed above, for the incorrect proposition that federal common law must be used to resolve competing benefit claims. *Newman* and *DeRocha* and the Supreme Court *Armstrong* decisions were cited in support of the incorporation of slayer principles in federal common law. A similar holding based on similar reasoning was reached in 2005 in *Connecticut General v. Riner*,⁸³² which cited both *H.E.B. Investment and Retirement Plan v. Harris* and *Addison v. Metropolitan Life Insurance*. Similarly, in 2006 in *Unum Insurance v. Locke, Jr.*,⁸³³ *Newman* and *DeRocha* were cited in support of the proposition that the insurance exclusion from the Explicit ERISA Preemption for life insurance was applicable.⁸³⁴ By contrast, in 2005 in *Clifton v. Anthony*,⁸³⁵ the court did not consider the applicability of ERISA when the participant's widow and sole designee of his employer life insurance proceeds was found not entitled to such benefits because she was convicted of murdering the participant.

Three cases illustrate the unnecessary issues that are created rather than resolved by treating slayer principles as part of federal common law applicable to ERISA plans. In 2005, the Ohio Supreme Court in *Ahmed v. Ahmed*,⁸³⁶ held that the participant's husband and primary beneficiary was not entitled to the proceeds

829. 217 F. Supp. 2d 759, 761-62 (E.D. Tex. 2002).

830. *Id.* at 761.

831. 212 F.3d 866, 870 (5th Cir. 2000).

832. 351 F. Supp. 2d 492 (W.D. Va. 2005), *aff'd.*, Conn. Gen. Life Ins. Co. v. Estate of Riner, No. 05-1084, 2005 U.S. App. LEXIS 15707 (4th Cir., July 29, 2005). The participant's husband and designee of the proceeds of the participant's life insurance was not entitled to the proceeds when convicted of murdering the participant. The participant's son from an earlier marriage was the contingent beneficiary.

833. No. 2:06 CV 0861, 2006 U.S. Dist. LEXIS 59222 (W.D. La. Aug. 21, 2006). The participant's stepfather and designee of the proceeds of the participant's ERISA life insurance would not be entitled to the proceeds if convicted of murdering the participant.

834. *See id.* at n.18 (providing a refutation of this assertion).

835. No. 9:03-CV-295, 2005 U.S. Dist. LEXIS 28920 (E.D. Tex. Nov. 16, 2005).

836. 817 N.E.2d 424 (2004).

of the participant's ERISA life insurance because he had murdered her.⁸³⁷ The husband did not challenge this determination. The issue was who was entitled to the proceeds. Under Ohio law, the contingent beneficiary, who was one of the two children of the participant and the spouse, would be entitled to the proceeds.

The *Ahmed v. Ahmed* court correctly concluded that the state slayer law was preempted under the *Egelhoff v. Egelhoff* principles.⁸³⁸ The court, however, then stated:

Since ERISA preempts R.C. 2105.19, the determination of who is a beneficiary of the life insurance policy is a question of federal law that must be determined using federal common law. *Tinsley v. Gen. Motors Corp.* (6th Cir.2000), 227 F.3d 700, 704; *Metropolitan Life Ins. Co. v. Pressley* (6th Cir.1996), 82 F.3d 126, 129.⁸³⁹

However, these cases show that federal common law is inapplicable.

In *Pressley*, the court concluded that ERISA § 404(a)(1)(D), 29 U.S.C. 1104(a)(1)(D) establishes a clear mandate that plan administrators follow plan documents to determine the designated beneficiary and cited *McMillan v. Parrott*.⁸⁴⁰ Thus, the *Pressley* court held there was no need to look to federal common law to decide that a state divorce decree did not determine the designee of an ERISA life insurance plan.

In *Tinsley*, discussed *supra*, the court decided it was necessary to use federal common law to determine whether a plan designation had been obtained by undue influence or had been forged, because there was no similar clear federal mandate how to make such determinations. The *Tinsley* court observed that by contrast, there was no need to invoke federal common law in *Pressley* or *Parrott*, because there was no question about the validity of the designation document in those cases.⁸⁴¹ Similarly in *Ahmed v. Ahmed* there was no question about the validity of the designation document, thus there is no need to use federal common law to look beyond designation documents to determine the designated beneficiary.

The *Ahmed* court then used "federal common law" to resolve the ambiguity it had created. First, it asserted that *Armstrong* prevented the murderer from collecting the insurance proceeds, which the designee was not contesting.⁸⁴² Second, the court decided not to attempt to ascertain the participant's intent, but

837. He was sentenced to death for the murder. *Id.* at 427.

838. *Id.* at 430-31. The court emphasized how the variance of slayer laws causes the slayer laws to be preempted. However, as discussed, *supra*, such variance is not necessary for federal preemption.

839. *Id.* at 432.

840. 913 F.2d 310, 312 (6th Cir. 1990).

841. *Id.*

842. *Ahmed*, 817 N.E.2d at 432.

rather to let the plain language of the insurance contract control after it had disregarded such plain language to create the issue. The court concluded that the contingent beneficiary was not entitled to the proceeds because the primary beneficiary was still alive. Nor, it asserted, is the clause for “no surviving beneficiary” triggered because named beneficiaries survive. Thus, the court concluded that the proceeds must go to the participant’s estate.⁸⁴³

A similar unnecessary ambiguity was created and resolved by the Seventh Circuit in 1999 in *Prudential Insurance v. Athmer*, in a non-ERISA case, which thus involved different considerations.⁸⁴⁴ In that case the participant’s spouse and designee under the SGLIA had murdered the participant, as in *Ahmed v. Ahmed*, and also did not challenge the revocation of his beneficiary designation.⁸⁴⁵ However, the Seventh Circuit held that the contingent beneficiary was therein entitled to the proceeds, which it found was the majority slayer approach, although that rule was subject to many caveats.⁸⁴⁶ In 2005 in *Atwater v. Nortel Networks, Inc.*,⁸⁴⁷ the court considered whether plan fiduciaries who are obligated to distribute the survivor benefits as soon as administratively or reasonably practicable may distribute part of such benefits to the designated beneficiary after learning the designee has been indicted for murder but before his murder conviction. The court applied the North Carolina slayer statute which it held was not preempted,⁸⁴⁸ to find that the participant’s estate was entitled to the survivor benefits and the plan had improperly paid the designee. Further proceedings were needed to determine if the estate was collaterally estopped from objecting or had waived its objections to the distributions and thus would not be entitled to those amounts from the plan. The court observed that among the questions would be raised in such cases are the following. May the fiduciaries pay the benefits at any time prior the conclusion of the criminal case? Is a “not guilty” criminal verdict sufficient to allow the designee to be paid? Is it advisable for the fiduciaries to interplead?

There were two holdings that the slayer principles were applicable to ERISA plans in theory but not under the particular facts. In 2003 in *Ruark v. Boiler Maker-Blacksmith National Pension Trust*,⁸⁴⁹ the court held that the slayer rules were applicable either under federal common law as discussed in

843. *Id.* at 434.

844. 178 F.3d 473 (7th Cir. 1999).

845. As in *Ahmed*, the murder must have been particularly heinous because the person was sentenced to life plus five years.

846. *Athmer*, 178 F.3d at 476-77 (7th Cir. 1999).

847. 388 F. Supp. 2d 610 (D.N.C. 2005).

848. *Id.* at 614-15.

849. No. AMD 02-2440, 2003 U.S. Dist. LEXIS 24695 (D. Md. June 9, 2003).

Addison v. Metropolitan Life Insurance or because state law was not preempted as discussed in *H.E.B. Investment & Retirement Plan v. Harris*. However, under both approaches the designee's homicide by motor vehicle of the participant (who was the designee's father) lacked sufficient intent to revoke the participant's designation. Similarly, in 2006 in *Hagedorn v. MetLife*,⁸⁵⁰ the court held that the slayer rules were applicable either under Washington state law, although the court noted arguments in favor of preemption, or federal common law as discussed in *Armstrong*. However, under both approaches there was no revocation because there was no showing that the designee wrongfully caused the death.

XIV. THE VIEWS OF OTHER COMMENTATORS

For more than fifty years, the Supreme Court has consistently rejected attempts by former spouses and others to override beneficiary designations, which otherwise comply with a variety of federal laws, including but not limited to ERISA. These decisions began with *Wissner v. Wissner*⁸⁵¹ in 1950 and concluded with *Egelhoff*.⁸⁵² In 1984, Congress amended ERISA to clarify the narrow circumstances under which DROs are not preempted but may become ERISA plan designations known as QDROs. Former spouses of participants may not otherwise obtain or give up ERISA benefit entitlements upon a marital dissolution, unless the plan terms provide that such dissolution results in a beneficiary change.

The Supreme Court has repeatedly held that ERISA preempts any state law, including a state court order, which attempts to affect the rights of beneficiaries under the terms of an ERISA plan.⁸⁵³ The Supreme Court has also repeatedly held that federal common law may not be used to generate equitable exceptions to fundamental ERISA mandates such as the Anti-Alienation Prohibition.⁸⁵⁴ The Supreme Court has similarly held repeatedly that equitable principles are applied very sparingly in ERISA, even with respect to the concept of equitable relief.⁸⁵⁵

850. No. C05-1083Z, 2006 U.S. Dist. LEXIS 27147 (W.D. Wash., Apr. 27, 2006).

851. 338 U.S. 655 (1950).

852. 532 U.S. 141 (2001).

853. *Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43 (1985); *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73, 83 (1995); *Boggs v. Boggs*, 520 U.S. 833 (1997); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).

854. *Guidry v. Sheet Metal Workers Natural Pension Fund*, 493 U.S. 365 (1990); *Patterson v. Shumate*, 504 U.S. 753 (1992); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993).

855. *Pilot Ins. v. Dedeaux*, 481 U.S. 41 (1995); *Great-West Life v. Knudsen*, 534 U.S. 204 (2002); *Sereboff v. Mid-Atlantic Med. Servs.*, 26 S. Ct. 1869 (2006).

Thus, there is little basis for the courts to use federal common law to generate equitable exceptions to the fundamental mandate that ERISA plan terms determine who is entitled to receive and keep ERISA plan benefits.

A number of commentators, like a number of the dissenters to the Supreme Court decisions, have suggested, in a very thoughtful manner, that it is advisable to (1) provide current or former spouses with greater or lesser rights in the course of marital dissolutions, and (2) better integrate the ERISA benefit designation rules with the state rules with respect to non-ERISA property transfers. This Article does not take a position on the advisability of those suggestions. Rather it argues that these suggestions are not consistent with the current terms of ERISA. ERISA achieves the equitable goals set forth in the Congressional Findings and Declaration of Policy of ERISA⁸⁵⁶ by imposing standards for the establishment and maintenance of ERISA plans rather than setting forth broad equitable principles for the governance of such plans. The courts lack the authority to implement these suggestions by any resort to federal common law because these issues do not concern gaps in the law. Such suggestions are best directed at Congress, which is best able to decide if there is a national consensus on these issues and, if so, to identify and implement the consensus on these issues. Moreover, Congress has the ability to change these rules in a manner that will be consistent with the uniform administration that has been a goal of ERISA from the date of its adoption so that employers will be encouraged to establish and maintain employee benefit plans.

Many of the suggestions deserve very serious consideration by Congress. For example, David S. Lebolt suggested that the Restatements of Law and Uniform Codes may be used as the basis for a uniform federal common law directed at marital dissolution, substantial compliance, slayer statutes, and undue influence that will include ERISA plan benefits in his Article.⁸⁵⁷ Similarly, Professor T. P. Gallanis suggested a number of statutory reforms in the area of survivorship, antilapse, revocation on divorce, revocation by homicide, and the elective share to better integrate the disposition of survivor benefits in his Article.⁸⁵⁸ Finally, Keron A. Wright and Jeffrey Gorris suggested that the Anti-Alienation rules be revised to permit ex-spouses to waive ERISA benefits in favor of new spouses when the plan terms prohibit such benefit changes in their respective well-written comments.⁸⁵⁹

856. ERISA § 2, 29 U.S.C. § 1001 (2000).

857. Lebolt, *supra* note 14.

858. T.P. Gallanis, *Symposium, Public Policy for Retirement Security in the 21st Century: Reform of Qualified Retirement Plans: ERISA and the Law of Succession*, 65 OHIO ST. L.J. 185 (2004).

859. Keron A. Wright & Jeffrey Gorris, *Comment, "Stuck on You": The*

XV. CONCLUSION

Entitlements to survivor benefits from ERISA plans are determined solely by designations pursuant to the terms of those plans. With respect to pension plans under ERISA, ERISA requires that there be only two statutory beneficiary designations, (A) provisions relating to QDROs and (B) provisions requiring that a participant's spouse be entitled to certain survivor benefits. Neither statutory designation applies to ERISA plans that are not pension plans, such as life insurance and disability plans.

Plan designations made by participants are not superseded by (A) an agreement by a participant marital dissolution to choose a designee; (B) an agreement by a former or separated spouse of a participant to relinquish ERISA plan benefits; or (C) any state law or federal common law principle that deprives the designated beneficiary of entitlement to ERISA plan benefits because the beneficiary has killed the participant.

ERISA voids both (A) a benefit claim against an ERISA plan not based on a designation made pursuant to the terms of the plan, and (B) a benefit claim against the recipients of plan benefits where the claim is not based on a designation made pursuant to the terms of the plan. Such designations made pursuant to the terms of an ERISA plan may not be superseded by state law, agreements that are not part of the ERISA plan, or federal common law principles.

