Did you advise your client to change his or her beneficiary designation(s) after the divorce?*

You are an estate planning and/or family law lawyer. Your client and his spouse discovered after a few years of marriage that the promise they made to each other to "have and hold each other for better, for worse, for richer, for poorer, in sickness and in health, until death do us part" was far from the reality of their lives and that they could no longer keep this promise to each other. Accordingly, they entered into a stipulated judgment terminating their marital status and waiving their rights to the other's property. The parties each placed their copy of the stipulated judgment in a safe deposit box and moved on with their lives. You too moved on with your life, content that the settlement terms were favorable to your client. Eight years later, you get a call from your client's daughter informing you that her father had passed away, that she is the executrix of his estate, and that the plan administrator of her father's ERISA governed retirement plan had released the retirement plan funds to the ex-wife rather than to the estate because her father, who had designated during his marriage his wife as beneficiary, had not changed the beneficiary designation after the divorce. Had you advised your client that he needed to change the beneficiary designation on his retirement after the divorce? Did your client believe that he was not required to change the beneficiary designation because ex-wife has waived her rights to his retirement in the stipulated judgment? Perhaps you should get off the telephone call with the daughter and call your malpractice carrier.

It is not uncommon for a marital estate to contain retirement plans, pensions, life insurance policies or other financial vehicles wherein one spouse has named the other spouse as his or her beneficiary. To the extent the parties to a marriage undergo a divorce and agree to waive their rights in to the other's ERISA governed retirement plan, the issue is whether the retirement plan beneficiary may waive in a divorce his or her interest through a divorce decree not amounting to a Qualified Domestic Relations Order ("QDRO") and to the extent the waiver is valid, whether the plan administrator is required to acknowledge the waiver.

Kennedy v. Plan Administrator for DuPont Savings and Investment Plan, et. al. addresses the above issues. In the *Kennedy* case, husband and wife married in 1971 and in 1974 husband signed a form designating his wife to take benefits under his Savings and Investment Retirement Plan ("SIP"), a retirement plan governed by ERISA. Husband did not name a contingent beneficiary. In 1994, the parties divorced. Pursuant to the divorce decree, wife waived all interest and claim to any "retirement plan, pension plan, or life benefit program existing by reason of [her husband's] past or present or future employment." Husband did not, however, execute any documents or beneficiary designation form to remove his wife as the beneficiary of his SIP and name another beneficiary. In 2001, husband died and his daughter, the executrix of his estate, requested the plan administrator distribute the balance of the SIP to the estate of husband. The plan administrator paid the balance of the SIP to the ex-wife, however, pursuant to the terms of the designation form previously signed by husband. The estate sued the retirement plan and the plan administrator arguing that ex-wife had effectively waived her rights to any benefit under SIP pursuant to the 1994 divorce decree and that distribution of the benefits to the ex-wife had violated ERISA.

The US District Court entered summary judgment for the estate, concluding that a beneficiary

can waive his or her rights to the proceeds of an ERISA plan, provided that the waiver is explicit, voluntary, and made in good faith. The Fifth Circuit reversed, citing ERISA's "anti-alienation" provision, and holding that the ex-wife's waiver constituted an unlawful assignment or alienation of her interest in the SIP benefits to the estate. Because the 1994 divorce decree did not meet the strict requirements for a QDRO, the Fifth Circuit held that ERISA prohibited the plan administrator from paying out benefits to anyone other than the designated beneficiary on file.

On the issue of whether ex-wife waived her benefit in SIP through the 1994 divorce decree, the United States Supreme Court held that ex-wife waived her benefits in the SIP benefits through the 1994 divorce decree and that the waiver was not bared by ERISA's "anti-alienation" provision. The waiver in the 1994 divorce decree did not purport to assign benefits to an alternate payee (i.e. ex-wife did not attempt to direct her interest in pension benefits to another person). Further, the Court noted that even if there had been a QDRO, a beneficiary seeking only to relinquish her rights to benefits cannot do this with a QDRO alone; there is no QDRO for a simple waiver.

On the issue of whether the plan administrator is required to acknowledge the waiver and distribute the SIP benefits to the estate, the United States Supreme Court held that the plan administrator was not required to acknowledge the waiver. Specifically, the Supreme Court held that a plan administrator fulfills his duties in accordance with the documents and instruments governing the plan pursuant to ERISA. The Court noted that ERISA provides not exception to the plan administrator's duty to act in accordance with the plan documents. Here, the plan documents and specifically the beneficiary designation on file directed the administrator to distribute the benefit to the ex-wife.

The *Kennedy* Court provides that a spouse can waive his or her interest in the other spouse's retirement plan through a non-qualified divorce decree. This waiver, however, pursuant to *Kennedy*, cannot be enforced by suing the plan administrator and demanding the administrator pay to the estate the benefits. So what good is a waiver unless it can be enforced? The Court, in a footnote, left open the possibility that the estate may have been able to pursue a claim against the ex-wife following her receipt of the SIP benefits. It seems the husband's estate (the executrix of the estate) should bring a state law constructive trust claim against ex-wife. The claim would have to be after the ex-wife receives the SIP benefits from the plan administrator.

Did you call your practice carrier yet or have you been deeply entrenched in your reading of this article? The *Kennedy* case makes it clear that a spouse's waiver of a pension in divorce decree will not trump the beneficiary designation. In cases with retirement plans, pensions, life insurance policies or other financial vehicles wherein one spouse has named the other spouse as his or her beneficiary, the lawyer must advise his or her client to take precautionary measures after the divorce to ensure that the situation which occurred in *Kennedy* does not happen to the client. To the extent one spouse is waiving his or her right to an interest in the other spouse's retirement plan, the lawyer must advise his client of the need to have the beneficiary designation consistent with the terms of the divorce decree and the settlement agreement or stipulated judgment must contain language that the waiving spouse will cooperate in signing any and all documentation necessary to effectuate a change in beneficiary. It recommended that any documents necessary to effectuate a change in beneficiary should be prepared and executed

along with the settlement agreement or stipulated judgment.

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