No. ________

In The
Supreme Court of the United States

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, DECEASED,

Petitioner,

v.

PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN; E.I. DUPONT DE NEMOURS & COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

STACY L. KELLY
Counsel of Record
ERIN E. EGGLESTON
MACINTYRE & MCCULLOCH, LLP
3900 Essex, Ste. 220
Houston, Texas 77027
(713) 572-2900
(713) 572-2902 (fax)

DAVID A. FURLOW
KEVIN PENNELL
THOMPSON & KNIGHT LLP
333 Clay St., Ste. 3300
Houston, Texas 77002
(713) 654-8111
(832) 397-8253 (fax)

Attorneys for Petitioner Kari Ellen Kennedy

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Estate of the late William P. Kennedy the proper recipient of the pension funds in his DuPont Savings and Investment Plan, as opposed to Mr. Kennedy's Ex-Wife Liv Kennedy, who entered into a 1994 divorce-decree that voluntarily waived those SIP benefits under federal common law and the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA")?

2. Does federal common law, as applied to Ex-Spouse Liv Kennedy's waiver of any right to receive William P. Kennedy's pension benefits in a 1994 divorce-decree, govern the judicial determination of whether DuPont's Plan Administrator wrongfully paid Mr. Kennedy's SIP benefits to his ex-spouse Liv Kennedy, as the District Court ruled, or was that court restricted to examining only DuPont's "Plan Document," that is, the late William P. Kennedy's 1974 beneficiary designation of his then-wife?

3. Was the Fifth Circuit correct in concluding that ERISA's Qualified Domestic Relations Order provision, 29 U.S.C. § 1056(d)(3)(B)(i), is the only valid way a divorcing spouse can waive her right to receive her ex-husband's pension benefits under ERISA?

4. What legal standards govern the award of fees to prevailing parties under ERISA (an issue of first impression for this Court)?

PARTIES TO THE PROCEEDINGS

Including the parties named in the caption of this Petition, the parties are:

Petitioners:	Kari Ellen Kennedy, Independent Executrix of the Estate of William Patrick Kennedy (the "Executrix").
Respondents:	The Plan Administrator for DuPont Savings and Investment Plan and E. I. DuPont de Nemours & Company.

CORPORATE DISCLOSURE STATEMENT

Petitioner Kari Ellen Kennedy is an individual who does not fall within the scope of Supreme Court Rule 29.6's disclosure requirement.

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OTHER AUTHORITIES

KARI ELLEN KENNEDY, Independent Executrix of the Estate of William Patrick Kennedy, Deceased, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (APP. 1 at 1-14) is published at 497 F.3d 426. The United States District Court for the Eastern District of Texas's final judgment (APP. 2 at 15-18), order on motion for attorney's fees (APP. 3 at 19-30) and order on motions for summary judgment (APP. 4 at 31-52) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2007. This Court has federal question jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act, 29 U.S.C §§ 1001 *et seq.* ("ERISA"); ERISA's Anti-Alienation provision, 29 U.S.C. § 1056(d)(1), and the Retired Equity Act's ("REA's") Qualified Domestic

Relations Order provision, 29 U.S.C. § 1056(d)(3), collectively APP. 7; ERISA's Fiduciary Duties Provision, 29 U.S.C. § 1104, APP. 8; and the ERISA Attorney's Fees Provision, 29 U.S.C. § 1132(g)(1), APP. 9, are involved in this appeal.

STATEMENT OF THE CASE

This is an ERISA appeal involving a divorce-related dispute about entitlement to pension benefits that pits the estate of a deceased, former DuPont employee/participant in DuPont's Savings and Investment Plan (the "SIP") against his ex-wife. The DuPont SIP is an "employee pension benefit plan" under ERISA, 29 U.S.C. § 1002(2).

A. William P. Kennedy's employment at DuPont and marriage to Liv Kennedy.

On June 30, 1971, the late William Patrick Kennedy ("Decedent Kennedy"), while working for DuPont, married Liv Kennedy (now, "Ex-Wife Kennedy"). APP. 4 at 32. While married, Kennedy signed a DuPont beneficiary designation form on December 6, 1974 (and again on July 21, 1980) that identified Liv, his then-wife, as the sole beneficiary of his SIP account. *Id.* at 32-33. Decedent Kennedy named no other or contingent SIP beneficiaries. *Id.*

B. William P. Kennedy's 1994 divorce and Ex-Wife Liv Kennedy's waiver of her right to receive her ex-husband's SIP benefits through the Kennedy divorce decree.

Decedent Kennedy divorced his wife Liv on June 2, 1994, resulting in a Final Decree of Divorce. APP. 4 at 33. Under that divorce decree, Ex-Wife Kennedy voluntarily agreed to her divestment of "all right, title, interest, and claim in and to . . . the proceeds therefrom, and any other rights related to any . . . retirement plan, pension plan, or like benefit program existing by reason of [decedent's] employment." APP. 1 at 2 (497 F.3d at 427-28) and APP. 6.

William P. Kennedy and Ex-Wife Liv Kennedy's attorneys prepared an ERISA Qualified Domestic Relations Order ("QDRO") under 29 U.S.C. § 1056(d)(3)(B)(i), and later amended it, receiving divorce court approval. It provided benefit-disbursement instructions for *part* of decedent's non-SIP employee-benefit plans, which are not disputed in this case. The divorcing Kennedys did not prepare a separate QDRO for the SIP in this appeal.

C. William P. Kennedy retired from DuPont in 1998 and died in 2001 without changing his 1974 beneficiary designation of Ex-Wife Liv in his DuPont pension plan.

William P. Kennedy retired from DuPont in 1998. He died in 2001. His death occurred seven years after divorcing Ex-Wife Kennedy, and twenty-seven years after he executed the DuPont SIP that named his then-wife as his sole beneficiary. He died without replacing Ex-Wife Kennedy as his SIP beneficiary.

D. The Kennedy Estate sued to recover $402,000 in pension benefits DuPont paid to Ex-Spouse Liv Kennedy without first filing an interpleader action to determine their ownership.

Kari Kennedy, the daughter of decedent and Liv Kennedy, was appointed Executrix of Decedent Kennedy's Estate. APP. 1 at 3. In letters to DuPont, Kari Kennedy (the Estate) demanded that her father's SIP funds be distributed to the Estate and pointed out that the Ex-Wife, Liv Kennedy, had voluntarily waived her right to receive her ex-husband's pension benefits under Texas Family Code § 9.302 (a law providing that a spouse's designation as a beneficiary is invalidated by a later divorce). APP. 1 at 3-4.

DuPont refused to pay Decedent Kennedy's pension benefits to the Estate, relying on the SIP beneficiary-designation to justify its payment, instead, to Decedent Kennedy's Ex-Wife Liv. *Id.* at 4. The Estate requested Liv Kennedy to relinquish her SIP interest, but she refused, and DuPont paid Ex-Wife Kennedy the SIP balance of some $402,000. *Id.* at 3.

Seeking to recover the SIP benefits, the Estate filed this claim under 29 U.S.C. § 1132(a)(1)(B) alleging that Ex-Wife Kennedy voluntarily waived her rights by filing for divorce and entering into a divorce decree and that DuPont had misdirected SIP benefits by paying them to Ex-Wife Kennedy. APP. 1 at 3; APP. 4 at 33-34. DuPont filed a third-party suit against Ex-Wife Kennedy and demanded return of the SIP benefits, a claim it later settled. APP. 1 at 3-4; APP. 4 at 34. Although it is not part of this Record, Liv Kennedy died on July 7, 2007 in Norway. Liv's death does not resolve the issues in this appeal.

The parties filed cross-motions for summary judgment. APP. 4 at 32-36. The district court granted summary judgment after concluding that Ex-Wife Liv Kennedy had waived her right to SIP benefits by entering into a divorce decree enforceable under Federal Common Law. *Id.* at 41-43.

"In this case," the district court ruled, "the decedent had no reason to submit a QDRO to the SIP due to the fact that none of the proceeds of that account were subject to division in the divorce." APP. 4 at 44. The district court relied on ERISA; the Retirement Equity Act's QDRO amendment to ERISA; this Court's rulings in *Boggs v. Boggs,* 520 U.S. 833 (1997) and *Egelhoff v. Egelhoff,* 532 U.S. 141 (2001); the Fifth Circuit's rulings in *Brandon v. Travelers Insurance Company,* 18 F.3d 1321, 1324 (5th Cir. 1994), *cert. denied*, 513 U.S. 1081 (1995) and *Stobnicki v. Textron, Inc.,* 868 F.2d 1460, 1465 (5th Cir. 1989); and the Seventh Circuit's opinion in *Fox Valley & Vicinity Construction Workers' Pension Fund v. Brown,* 897 F.2d 275, 277-80 (7th Cir. 1990), *cert. denied,* 498 U.S. 820 (1990). APP. 4 at 43-45. The district court concluded that "the benefits were wrongly paid to Mrs. Kennedy" and awarded the Estate $402,152.56 equal to the SIP funds DuPont paid to Ex-Spouse Kennedy. *Id.* at 45.

Although the Executrix had been acting in a fiduciary capacity and had prevailed on its substantive claim, and although DuPont had been on notice of the Estate's claim when it acted without filing an interpleader to determine the SIP funds' owner, the district court awarded no attorney's fees to the Estate. APP. 3 at 19-30. It held, *inter alia,* that DuPont had not shown enough "culpability" under the Fifth Circuit's five-factor abuse of discretion test in *Dial v. NFL Players Supplemental Disability Plan,* 174 F.3d 606, 614 (5th Cir. 1999) to warrant reversal. APP. 3 at 24-26.

E. The Fifth Circuit, basing its decision on ERISA's anti-alienation and REA's QDRO provisions, reversed the district court's award to the Estate.

The Estate defended the district court's judgment in DuPont's Fifth Circuit appeal by arguing that ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1), does not apply to the knowing, intentional waiver of beneficiary rights, the subject of this appeal. The Estate explained that Federal Common Law determined the outcome of issues involving waiver of beneficiary rights. *Id.* at 11-16.

On appeal, the Estate averred that a beneficiary can alter or avoid her right to receive ERISA benefits by means other than a QDRO, a position consistent with the Fifth Circuit's prior, pro-waiver decisions in *Rhoades v. Casey,* 196 F.3d 592 (5th Cir. 1999) and *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000), *cert. denied*, 532 U.S. 941 (2001), as well as the circuit's post-*Egelhoff* precedent in *Guardian Life Ins. Co. v. Finch,* 395 F.3d 238 (5th 2004). *See* Appellee's Brief at 7-17. The Estate cross-appealed the district court's refusal to award attorney's fees, challenging that decision as an abuse of discretion on pages 32-52 of its Appellee's Brief and throughout its Cross-Appellant's Brief.

On August 15, 2007, the Fifth Circuit reversed the district court's judgment awarding the Estate the value of William P. Kennedy's SIP funds. APP. 1 at 5-10. It noted that Mr. Kennedy had not memorialized his de-designation of Ex-Wife Kennedy in a QDRO and ruled that the absence of a QDRO precluded enforcement of Ex-Wife Kennedy's divorce-decree waiver. *Id.* at 5-10. It ruled that, "[i]n the marital-dissolution context, the QDRO provisions supply the *sole* exception to the anti-alienation provision; they exempt a state domestic-relations order determined to be a QDRO, under the standards set forth in ERISA." APP. 1 at 9-10. ERISA's QDRO provision, 29 U.S.C. § 1056(d)(3)(A), states that the anti-alienation provision "shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, *except that . . . [it] shall not apply if the order is determined to be a [QDRO]*" (emphasis added). The Fifth Circuit affirmed the district court's denial of attorney's fees to the Estate and re-affirmed the validity of the ERISA five-factor test. *Id.* at 11-14.

REASONS FOR GRANTING THE PETITION

This Court should review the Fifth Circuit's August 15, 2007 decision for two reasons. First, this appeal offers this Court an excellent opportunity to heal the multiple fractures dividing the circuit courts and state supreme courts about whether ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1), and its QDRO provision, 29 U.S.C. § 1056(d)(3)(B), negate a non-participant beneficiary's voluntary divorce-court waiver of ERISA benefits. The Fifth Circuit abandoned prior precedent by holding that a divorce-court waiver is enforceable *only* if memorialized in a QDRO, further confusing a chaotic body of law that has grown ever more muddled during the past seventeen years. Second, this Court has never decided what standard governs the recovery of attorney's fees in ERISA cases. The Court should grant *certiorari* to resolve these multiple circuit conflicts and correct the Fifth Circuit's erroneous decision.

I. The circuits and state supreme courts are divided - and dividing further - about whether federal common law or only plan-documents control the determination of whether an ex-spouse's voluntary divorce-decree waiver of pension benefits trumps ERISA's anti-alienation provision.

Section 1144(a) of ERISA states that the statute supersedes all state laws that relate to any employment benefit plan. But when ERISA does not expressly address a particular issue of state law, such as beneficiary designations, circuit and state supreme courts have reached remarkably different conclusions, producing a multipolar hodge-podge of contrasting, conflicting interpretations of federal law.

The first, and now ever-widening, ERISA split has existed for at least seventeen years. It divides the majority "Federal Common Law" courts that look to federal common law in interpreting voluntary waivers from the minority "Plan Documents" courts that refuse to look past corporate plan documents. Most courts follow this Court's lead in ERISA cases by using federal common law as the starting point in ERISA statutory analysis. *Varity Corp. v. Howe*, 516 U.S. 489, 498, 502 (1996).

A. The "Federal Common Law" courts.

The "Federal Common Law" courts include the First Circuit (a district court), the Fourth, Fifth, Seventh, Eighth, and Tenth Circuits, and almost all state courts. First Circuit: *Metropolitan Life Ins. Co. v. Flinkstrom*, 303 F.Supp.2d 34, 39-43 (D. Mass. 2004); Fourth Circuit: *In re Estate of Altobelli v. International Bus. Machines Corp.*, 77 F.3d 78, 81-82 (4th Cir. 1996); Fifth Circuit: *Pitts v. Am. Sec. Life Ins. Co.*, 931 F.2d 351, 355 (5th Cir. 1991); *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer*, 354 F.3d 348, 359 (5th Cir. 2003), *rhg. and rhg. en banc denied*, 89 Fed. Appx. 905 (5th Cir. 2004), *cert. denied*, 541 U.S. 1072 (U.S. 2004); Seventh Circuit: *Melton v. Melton,* 324 F.3d 941, 945 (7th Cir. 2003); *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown,* 897 F.2d 275, 280-81 (7th Cir.) (*en banc*), *cert. denied,* 498 U.S. 820 (1990); Eighth Circuit: *National Auto Dealers & Assocs. Retirement Trust v. Arbeitman,* 89 F.3d 496, 500 (8th Cir. 1996); *Hill v. AT&T Corp.,* 125 F.3d 646, 648 (8th Cir. 1997); *Mohamed v. Kerr,* 53 F.3d 911, 914 (8th Cir. 1995), *cert. denied,* 516 U.S. 868 (1995); *Lyman Lumber Co. v. Hill,* 877 F.2d 692, 693-94 (8th Cir. 1989); Tenth Circuit: *Metropolitan Life Ins. Co. v. Hanslip,* 939 F.2d 904, 907 (10th Cir. 1991); Michigan: *MacInnes v. MacInnes,* 677 N.W.2d 889, 893-894 (Mich. Ct. App. 2004); Nebraska: *Strong v. Omaha Constr. Ind. Pension Plan, Inc.,* 270 Neb. 1, 701 N.W.2d 320 (Neb. 2005) (*per curiam*); New York: *Silber v. Silber,* 99 N.Y.2d 395, 404, 786 N.E.2d 1263 (N.Y. 2003); and Texas: *Keen v. Weaver,* 121 S.W.3d 721 (Tex. 2003), *cert. denied*, 540 U.S. 1047 (2003).

B. The "Plan Documents" courts.

The opposing "Plan Documents" minority courts include the Second, Third and Sixth Circuits. *See, e.g.,* Second Circuit: *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 16 (2nd Cir. 1993); Third Circuit: *McGowan v. NJR Service Corp.*, 423 F.3d 241, 244-45 (3rd Cir. 2005), *cert. denied*, ___ U.S. ___, 127 S. Ct. 1118, 166 L. Ed. 2d 906 (2007) (Maj. Op.) (explaining the "Federal Common Law" approach but applying the minority "Plan Documents" approach to hold a waiver invalid); Sixth Circuit: *McMillan v. Parrott*, 913 F.2d 310, 311-12 (6th Cir. 1990) (applying the "Plan Documents" approach to hold a divorce-waiver invalid); *Metropolitan Life Ins. Co. v. Marsh,* 119 F.3d 415, 421 (6th Cir. 1997); *Metropolitan Life Ins. Co. v. Pressley,* 82 F.3d 126, 130 (6th Cir. 1996).

C. The new QDRO circuit-split.

A recent split within the Federal Common Law camp separates "QDRO – *one* form of waiver" from "QDRO is the *only* waiver" courts. The "QDRO – *one* form of waiver" courts hold that a beneficiary of a *pension* plan can waive benefits through a divorce decree. *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown,* 897 F.2d 275, 280-81 (7th Cir.) (*en banc*), *cert. denied,* 498 U.S. 820 (1990); *McGowan,* 423 F.3d at 256-260 (Fuentes, J., dissenting); *Keen v. Weaver,* 121 S.W.3d 721, 724-26 (Tex. 2003), *cert. denied*, 540 U.S. 1047 (2003).

The "QDRO is the *only* waiver" courts conclude that the QDRO provision, coupled with ERISA's anti-alienation clause, preclude enforcement of an ex-spouse's voluntary divorce-court waiver of pension benefits. *McGowan v. NJR Service Corp.*, 423 F.3d 241, 244-45 (3rd Cir. 2005); *Smith v. E. I. DuPont de Nemours & Co.,* 402 F.Supp.2d 519, 523 (D. Del. 2005). *Cf. Hamilton v. Washington State Plumbing & Pipefitting Indus. Pension Plan,* 433 F.3d 1091, 1100 n.10 (9th Cir. 2006), *cert. denied,* ___ U.S. ___, 127 S. Ct. 86, 166 L. Ed. 2d 32 (U.S. Oct. 2, 2006) (citing *McGowan* in its analysis of QDRO law); *Alberici Corp. v. Davis,* No. 4:04-CV-545 CEJ, 2006 U.S. Dist. LEXIS 68539 at *7-12 (E.D. Mo. Sept. 12, 2006), *aff'd,* 186 Fed. Appx. 690 (8th Cir. 2006) (*per curiam*). The Fifth Circuit joined this "QDRO – *Only* Form of Waiver" faction in this case. *See Kennedy v. Plan Adm'r for the DuPont Sav. & Inv. Plan,* 497 F.3d 426, 431-32 (5th Cir. 2007).

D. A case simpler and more *certiorari*-worthy than *McGowan v. NJR Service Corporation*.

This case is more *certiorari*-worthy than *McGowan v. NJR Service Corporation*, 423 F.3d 241, 244-45 (3rd Cir. 2005), *cert. denied,* ___ U.S. ___, 127 S. Ct. 1118, 166 L. Ed. 2d 906 (U.S. 2007), the ERISA/waiver case this Court considered last year. While the three-way division of the judges on the *McGowan* panel mirrors the broadening conflict among the courts of appeals and state courts about whether a purported waiver by an ERISA beneficiary must be given binding effect as a matter of federal common law, there are substantial reasons to believe that courts that had enforced waivers as a matter of federal common law in other circumstances would not have done so in the context of *McGowan's* post-retirement, Qualified Joint Survivor Annuity under 29 U.S.C. § 1055 ("QJSA").

The Federal Common Law versus Plan-Documents divide, and the more recent schism about QDROs and anti-alienation provisions, are important to pension-plan participants, beneficiaries, plan administrators, the Department of Labor, and state and federal courts. *McGowan*, which arose in an unusual factual context that implicates special rules on which there was no conflict, presented a less appropriate vehicle to resolve the broader questions of common law waiver that divide our courts. Accordingly, this petition should be granted despite the denial of the petition in *McGowan*.

E. A case in the collision-prone intersection of pension, family, and common law.

The issues in this appeal have a nationwide impact. According to the Department of Labor's *National Compensation Survey: Employee Benefits in Private Industry in the United States, March 2006* (U.S. Bureau of Labor Statistics, Aug. 2006), fifty-four percent (54%) of workers had access to retirement plans, and fifty-one percent (51%) participated in a retirement plan of at least one type. *Id.* at p. 1, Summary 06-05, and Tables 7 and 8, available at http://www.bls.gov/ncs/ebs/sp/ebsm0004.pdf.

In 2005, the last year for which figures are reported, there were some 2,230,000 marriages in the United States. The marriage rate that year, per 1,000 people, was seven and one-half percent (7.5%), while the divorce rate was three point six percent (3.6). Thus, a little less than half of current marriages, or a little more than a million per year, now end in divorce. *See* http://divorcemag.com/statistics/statsUS.shtml (quoting U.S. Census Bureau and National Center for Health Statistics). Since fifty-one percent (51%) of workers have pension plans, an appeal about pension payments in a divorce context could have a major impact on approximately 300,000 to 400,000 divorcing workers per year, and on their families, friends, and beneficiaries as well.

To put it simply, an appeal that examines the intersection of divorce, pension, and common law – an intersection fraught with case law collisions – will clarify important issues that affect millions of pension-plan participants whose marriages end in divorce, as well as many others. This is a *certiorari*-worthy case.

II. The Fifth Circuit erred in holding that ERISA's QDRO provision is the *only* way a divorcing spouse can waive an ex-spouse's pension benefits under ERISA's anti-alienation provision.

The Fifth Circuit erred in this case, in a manner harmful to justice on a nationwide level, by holding that the ERISA/REA QDRO provision, 29 U.S.C. § 1056(d)(3)(B)(i), is the *only* form that a divorcing spouse can use to waive her right to receive her ex-husband's pension benefits under ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1).

A. The Federal Common Law approach comports with ERISA's intent, legislative history, and the REA amendment, which introduced the QDRO safe-harbor to clarify the law of waiver, not to displace it.

A Federal Common Law analysis makes more sense than the Fifth Circuit's "QDRO is the *only* waiver" rule because the traditional approach comports with ERISA's overriding purpose of ensuring that employees "receive the pensions and other benefits that they were led to believe they would receive upon retirement." *See* Ryan P. Barry, Comment, *ERISA's Purpose: The Conveyance of Information from Trustee to Beneficiary*, 31 CONN. L. REV. 735 (1999) (citing Welfare and Pension Plan Legislation: hearings on H.R. 2 and H.R. 462 before the H. SUBCOMM. ON LABOR OF THE COMM. ON EDUC. AND LABOR, PART 2, 93D CONG. 1 (1973) (statement of Rep. John

H. Dent, Chairman, Subcomm. On Labor) and 120 CONG. REC. H29, 197 (1974) (Rep. John Dent). *See also* 29 U.S.C. §§ 1001-1461 (1994); Pub. L. No. 93-406, 88 Stat. 829 (1974).

A review of ERISA's legislative history demonstrates that the statute's overriding purpose is to protect the interests of participants and beneficiaries, and that enhancement of plan-administrators' convenience was always a secondary objective.

In the late 1960s, New York Senator Jacob Javits first proposed the tax bill that later evolved into a labor bill and eventually resulted in ERISA. *See* 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, 703 n.165 (Spring 2006), *citing* Camilla E. Watson, *Broken Promises Revisited: The Window of Vulnerability for Surviving Spouses Under ERISA,* 76 IOWA L. REV. 431, 444 (1991). Congressional hearings led to recommendations that later evolved into important ERISA provisions. *See* Wright, *Stuck on You,* 45 WASHBURN L.J. at 703.

Senator Javits proposed the legislation that became the earliest draft of ERISA, styled the Welfare and Pension Plans Disclosure Act. *See* 119 CONG. REC. 127, 12075 (1973). He noted that his amendment to existing law was aimed at "strengthening greatly the disclosure requirements [and] . . . establishing fiduciary standards to protect the rights of workers covered by . . . pension benefit[] plans." *Id.* "The fundamental purpose," he explained, was to protect the "interests of the participants and beneficiaries of employee welfare and pension benefit plans." *Id.*

Senator Javits explained that Congress intended federal courts to develop substantive law to address issues regarding rights and obligations under the plans, foreseeing the development of a federal common law of ERISA. *See* Wright, 45 WASHBURN L.J. at 703 at n.172, (citing Michael J. Collins, *It's Common, but Is It Right? The Common Law of Trusts in ERISA Fiduciary Litigation,* 16 LAB. LAW. 391, 399 n.61 (2001) (citing 120 CONG. REC. 29942 (1974))). "In addition, Senator Williams compared ERISA to the Labor-Management Relations Act of 1947, which had a well-developed common law at the time of ERISA's passage." *Id.* (citing 120 CONG. REC. 29933 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5177, 5188). Senator Javits explained that ERISA was intended to serve as "a pension 'bill of rights.'" 120 CONG. REC. 29935 (1974).

Prior to the bill's enactment in 1974, the Chair of the General Subcommittee on Labor explained that the bill's "most important purpose will be to assure American workers that they may look forward . . . to a retirement with financial security and dignity." H.R. REP. NO. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4646. The bill became known as the Retirement Income Security for Employees Act ("ERISA"). *See* 119 CONG. REC. 318, 30392 (1973). The history of ERISA shows that Congress intended

ERISA to encompass common law and fiduciary duty principles to ensure the protection of participants and beneficiaries.

On Labor Day, 1974, President Gerald Ford signed into law the Employee Retirement Income Security Act of 1974. *See* Wright, 45 WASHBURN L.J. at 690 n.31, (citing James A. Wooten, *The Employee Retirement Income Security Act of 1974: A Political History* 1 (2004) (referencing SEN. COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 at 4747 (Comm. Print 1976))). President Ford explained that, "this is really an historic Labor Day, historic in the sense that this legislation will probably give more benefits and rights and success in the area of labor-management than almost anything in the history of this country." *Id.*

This Court analyzed ERISA's legislative history and emphasized the statute's focus on providing benefits. *See Boggs v. Boggs,* 520 U.S. 833, 852 (1997) ("Besides the anti-alienation provision, Congress has enacted other protective measures to guarantee that retirement funds are there when a plan's participants and beneficiaries expect them."). The legislative history indicates that ERISA "is concerned with improving the fairness and effectiveness of qualified retirement plans in their role of providing retirement income." H.R. REP. NO. 93-807, at 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4676.

In 1984, Congress enacted the Retirement Equity Act that amended ERISA to create QDROs. The REA did so to provide a clear safe-harbor mechanism for recognizing the interest of a non-participant spouse interested in protecting her right to receive benefits under ERISA retirement plans. *See, e.g., Dorn v. Int'l Bhd. of Elec. Workers,* 211 F.3d 938, 942 (5th Cir. 2000).

As amended, ERISA requires a pension plan to prohibit the alienation or assignment of benefits. 29 USC § 1056(d)(1). This "spendthrift" provision is designed to "ensure that the employee's accrued benefits are actually available for retirement purposes," by preventing unwise assignment or alienation. H.R. REP. NO. 807, 93rd Cong., 2d Sess. 1974, *reprinted in* 1974 U.S.C.C.A.N. 4639 at 4670, 4734. In short, Congress did not want pension plan participants squandering their life savings on trips to Vegas, timeshares, and lavish, pre-retirement lifestyles.

Congress intended QDROs to serve as *one* exception to ERISA's general prohibition on alienation or assignment of benefits to allow the attachment of an employee's pension benefits to satisfy his or her family support obligations. *See* S. REP. NO. 575, 98th Cong., 2d Sess. 18-19, *reprinted in* 1984 U.S.C.C.A.N. 2547 and 2564-65. Congress's Subcommittee on Labor stated that ERISA was enacted to ensure American employees a retirement with "financial security and dignity." *See* H.R. REP. NO. 95-533, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4646.

The 1984 REA amendments made clear that a QDRO was *a* proper method for preserving the interests of a former spouse in pension benefits. *See* S. REP. NO. 575, 98th Cong., 2d Sess. 19, *reprinted in* 1984 U.S.C.C.A.N. 2547 at 2565. That legislative history indicates that the Congress enacting the REA did not view a QDRO as *conflicting* with ERISA's anti-alienation provision.

The Senate Committee Report on the REA states that "in the case of a [QDRO], the bill *clarifies* that such order does not result in a prohibited assignment or alienation of benefits under the spendthrift provisions of the Code or ERISA." *See* SEN REP. NO. 98-575, at 3 (1984) (emphasis supplied), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2549.

The important term "clarifies" demonstrates that the 1984 Congress did not view the anti-alienation provision as applying to QDROs, even prior to the adoption of REA. Congress' choice of *clarifying* language suggests that its members viewed the anti-alienation provision as containing certain inherent exceptions. *See, e.g., Tenneco, Inc. v. First Va. Bank of Tidewater*, 698 F.2d 688, 690 (4th Cir. 1983). In *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), this Court noted that,

> Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction . . . the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong,

> especially when Congress has refused to alter the administrative construction.

Id. at 381-82. This Court properly gives due consideration to Congress' intent to clarify a statutory scheme that already recognized and retained the existence of waivers to ERISA's anti-alienation provision while providing an additional safe harbor QDRO provision to protect the interests of divorcing spouses when that protection makes sense. ERISA's legislative history weighs heavily against the argument that the 1984 Congress intended QDROs to be the only exception to the anti-alienation provision in divorce proceedings.

B. Given Ex-Wife Kennedy's divorce-decree waiver of pension benefits, there was no need for the QDRO's protections here, so the Fifth Circuit thwarted the expectations of Decedent Kennedy and conferred a windfall on Ex-Wife Kennedy.

There was no need for the divorcing Kennedys to submit a QDRO for the SIP benefits because none of the remaining proceeds were subject to property-division in divorce court. APP. 4 at 44 (district court opinion). After all, Ex-Wife Kennedy had agreed that she would receive no SIP benefits belonging to William P. Kennedy.

A QDRO creates a right to benefits in the alternate payee, but it does not reflect a *waiver* of rights. It is a positive *assignment* of a participant's retirement benefit proceeds rather than a negative *disclaimer* of those benefits. Unless Ex-Wife Kennedy was to receive a portion of the SIP benefits, submitting a QDRO covering SIP benefits would have made no sense to the Kennedys or their divorce lawyers.

The divorcing Kennedys agreed that Ex-Wife Kennedy had no right to receive William P. Kennedy's SIP benefits. Decedent Kennedy never submitted a QDRO covering the SIP benefits. If the Kennedys had wished to provide Ex-Wife Kennedy with an interest in the SIP benefits, they would have executed a QDRO establishing such a right.

DuPont's SIP benefits at issue here did not become payable at retirement but only on Decedent Kennedy's death. Ex-Wife Kennedy had no right to receive those benefits during Decedent Kennedy's life. Application of the spendthrift provisions of ERISA to Ex-Wife Kennedy's waiver of benefits does not further the protect-benefits-until-retirement purpose of the anti-alienation statute.

As this Court has noted, the purpose of the spendthrift clause is to safeguard a stream of income for pensioners and their dependents. To bar a waiver in favor of the pensioner himself would not advance that purpose. *In re Estate of Altobelli v. International Business Machines Corp.,* 77 F.3d 78 (4th Cir. 1996) (quoting *Guidry v. Sheet Metal Workers Nat'l Pension Fund,* 493 U.S. 365, 376 (1990)).

C. A flexible Federal Common Law approach, as opposed to the Fifth Circuit's "QDRO is the *only* waiver" approach, avoids thwarting the expectations of participants, heirs, and beneficiaries.

Opinions that refuse to recognize an exception to ERISA's anti-alienation provisions for an explicit, voluntary waiver foster absurd results. As the dissent recognized in *Egelhoff v. Egelhoff,* 532 U.S. 141 (2001), application of the minority approach would result in the perversity of a plan administrator having to give benefits to a named beneficiary who murdered the participant. *Egelhoff* at 159-160.

The Fifth Circuit's opinion undermines this Court's determination, as expressed in *Firestone Tire & Rubber Co.,* 489 U.S. at 110, that federal courts have the power to shape federal common law in response to the needs of a particular case. The Fifth Circuit should have applied the Seventh Circuit's federal common law approach in *Fox Valley* to further the authority this Court granted to create and apply substantive law to issues not explicitly regulated by ERISA. *See* Jeffrey A. Brauch, *The Federal Common Law of ERISA,* 21 HARV. J.L. & PUB. POL'Y 541, 549 (1998).

The Fifth Circuit erred when it failed to consider ERISA Section 1104 as a whole and elevated a secondary concern, the convenience of plan administrators, over ERISA's prime directive to protect the interests of participants and beneficiaries. ERISA Section

1104(a)(1) imposes a fiduciary standard on the plan administrator, requiring him to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." *See, e.g.,* 29 U.S.C. § 1104(a)(1). The August 15, 2007 panel should have adhered to its *Guardian Life, Brandon,* and *Stobnicki* rulings rather than follow the Third Circuit into *McGowan's* quagmire of confusion. The Federal Common Law courts reasonably recognize that *ERISA does not address waiver by a beneficiary.*

The Fifth Circuit's departure from past precedent raises the prospect of awarding windfalls to murderers who slay their own spouses. Under the typical state slayer-statute, for example, a murderer relinquishes all right to receive any of the participant's property or other benefits. This reflects the sound reasoning that those who kill loved ones should not profit by their wrong-doing. As the Texas Supreme Court observed in its analysis of the interaction of ERISA pension law and divorce-decree waivers in *Keen v. Weaver,* 121 S.W.3d 721 (Tex. 2003), "at least one other court following *Egelhoff* has also held that a murderer should not be permitted to receive benefits from a victim's plan, either under a slayer statute or under federal common law." *Keen*, 121 S.W.3d at 726 n.4, citing *Admin. Comm. for the H.E.B. Inv. and Ret. Plan v. Harris,* 217 F.Supp.2d 759, 761-62 (E.D. Tex. 2002).

But, under either the minority Plan Documents dogma or the zero-tolerance Fifth Circuit "QDRO is the *only* waiver" test, he who slays his spouse or his parents can still pocket the pension payments, for the statute that denies those benefits to the murderous beneficiary would constitute an unlawful "assignment or alienation" (or "a direct *or indirect arrangement*") prohibited by ERISA's anti-alienation provision. *Cf. Rhoades v. Casey*, 196 F.3d 592 (5th Cir. 1999). The flexible Federal Common Law approach, which uses and enforces the experience of common law courts acquired over centuries of jurisprudence, avoids such absurd and irrational outcomes by interpreting pension plan documents and anti-alienation provisions in a more reasonable and less stringent manner.

The Fifth Circuit's August 15, 2007 analysis conflicts with other circuits' and state supreme court holdings on the interaction of federal common law in ERISA cases. Not only has the Fifth Circuit "entered a decision in conflict with the decision of another United States court of appeals" under SUP. CT. R. 10(A), it has also issued an opinion in conflict with its own ERISA precedent.

D. The Fifth Circuit's opinion conflicts with IRS General Counsel Memorandum 39,858's policy of recognizing that post-death disclaimers of ERISA benefits do not constitute prohibited assignments or alienations.

The August 15, 2007 Opinion has the potential to create mischief not only within the circuit but on a nationwide level because it directly conflicts with the policy of the Internal Revenue Service, as reflected in its GENERAL COUNSEL MEMORANDUM 39,858, 1991 WL 776304 (Sept. 23, 1991) (the "IRS GCM"). It states that disclaimers by named beneficiaries of ERISA pension plans after the participant's death do *not* violate ERISA's anti-alienation provision. I.R.S. GEN. COUNS. MEM. 39,858.

If it remains un-reversed, the August 15, 2007 Opinion will prevent surviving ex-spouses from disclaiming ERISA retirement benefits. GCM 39,858 concludes that "a disclaimer of benefits under a qualified plan does not constitute a prohibited 'assignment or alienation' of plan benefits" under ERISA. *See* I.R.S. GCM 39,858. It notes that numerous areas of the law, including the Bankruptcy Code, the Uniform Probate Code, and trust law, recognize that waivers and disclaimers are not "transfers," and that it finds "no evidence that Congress intended to preclude a spouse from disclaiming or renouncing benefits under a qualified plan payable after the participant's death." *Id.* But the Fifth Circuit has reached the opposite conclusion that will undermine the IRS policy in Texas, Louisiana, and Mississippi.

In explaining this decision, the Fifth Circuit defined an "assignment or alienation" as "[a]ny direct *or indirect arrangement* . . . 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*." APP. 1 at 8, citing 26 C.F.R. § 1.401(a)-13(c)(1)(ii). Under this rationale, an ex-spouse's voluntary disclaimer of a participant's ERISA benefits under Section 2518 of the Internal Revenue Code would violate ERISA's anti-alienation provisions since a disclaimer would be an unlawful, "indirect arrangement" through which someone else gains an interest enforceable against a pension plan. The opinion thus infringes on freedom of contract.

The August 15, 2007 ruling will thus compel surviving spouses to accept pension benefits they might not need and may not want – in cases where such an inflexible and unnecessary rule could adversely impact other benefits individuals receive under law, contract, or public assistance. A surviving spouse might want to disclaim certain plan benefits to avoid creating a taxable estate at death or to continue to receive governmental benefits. As one commentator notes: "What is a plan to do: sneak by the beneficiary's house at night, jimmy open a window, and pour the cash into the bedroom?" Comment, *Who Is the Payee, Part VIII: Altobelli v. IBM and the Other Beneficiary Waiver Cases,* 14 ERISA LITIG. REPTR. 16 (Aug. 1996).

E. The new opinion conflicts with the Texas Supreme Court's 2003 *Keen v. Weaver* decision, creating a federal versus state of Texas shootout leading to forum-shopping, sharp practice, and courtroom chaos.

The August 15, 2007 Opinion conflicts materially with the Texas Supreme Court's reasoning and ruling in *Keen v. Weaver,* 121 S.W.3d 721 (Tex. 2003), *cert. denied*, 540 U.S. 1047 (2003), where the Texas Supreme Court enforced a divorce-decree waiver in strikingly similar circumstances. A 5-4 majority decided the *Keen* case, exemplifying the utter lack of consensus in ERISA divorce-decree waiver jurisprudence as much as the 3-way split in the *McGowan* panel decision this Court considered for certiorari last year.

A similar fact scenario led the Nebraska Supreme Court to rule in favor of a late plan-participant's estate and against his ex-spouse in *Strong v. Omaha Construction Industry Pension Plan,* 701 N.W.2d 320, 327-31 (Neb. 2005) (*per curiam*). The dissent in the Nebraska Supreme Court, like the dissent in the Texas Supreme Court, reflects the need for a writ of certiorari in this important field of law.

The Texas Supreme Court's *Keen* majority opinion showed a better appreciation for the intricacies of the ERISA statutory scheme and the existence of statutory and common law waiver within that scheme in its analysis of a similar divorce-decree dispute:

> While Patsy [Keen]'s interpretation is simple and easy to apply, *we do not believe that ERISA's text prohibits a plan administrator from recognizing a beneficiary's waiver, disclaimer, or other repudiation of plan benefits*. First, other provisions of ERISA require plan administrators to look beyond beneficiary designations in plan documents to determine entitlement to plan benefits. For

> example, while ERISA generally prohibits a participant's assignment or alienation of pension benefits, since 1984 ERISA has provided a limited exception if the benefits are the subject of a qualified domestic relations order (QDRO). *See* 29 U.S.C. § 1056(d)(3)(A). A plan administrator presented with a QDRO that satisfies ERISA's fairly detailed requirements must pay an alternate payee designated in the QDRO rather than the beneficiary designated in plan documents. *Boggs v. Boggs,* 520 U.S. 833, 846-47 ... (1997). And a spouse who is a designated beneficiary of a joint and survivor annuity may waive entitlement to those benefits under certain circumstances. 29 U.S.C. § 1055(c)(1)(A). Furthermore, the Supreme Court has recognized that ERISA welfare plan benefits may be garnished under state procedures. *See Mackey v. Lanier Collection Agency & Serv. Inc.,* 486 U.S. 825, 841 ... (1988).

Keen, 121 S.W.3d at 724-25 (emphasis supplied). The Kennedy Estate commends this analysis of waiver law, which exemplifies the rationale of other courts using the majority Federal Common Law analysis.

The Kennedy Estate pointed out the Texas Supreme Court's *Keen v. Weaver* ruling on pages 11, 14, and 28 of its Appellee's Brief, thus making the Fifth Circuit aware that any abandonment of its prior federal common law waiver precedent could open a gaping chasm between ERISA law in Texas state courts and ERISA law in Texas' four federal district courts. This Fifth Circuit panel plowed ahead anyway, heedless of the chaos its actions are bound to cause businesses, individuals, courts, and plan administrators in the Lone Star State.

The Texas Supreme Court's *Keen* opinion noted that "Section 9.302 of the Texas Family Code, known as the 'redesignation statute,' provides that the designation of a spouse as a retirement account beneficiary is rendered ineffective by a subsequent divorce." *Id.*, 121 S.W.3d at 723. The Majority further observed that, "If the statute applied here, it would operate to award Rita's estate the plan proceeds as the alternate beneficiary." Yet the court held, properly, that ERISA pre-empted the re-designation statute. *Id.*

The state re-designation statute that the Texas Supreme Court considered typifies similar statutes from all across the country that reflect the accumulated experience of the states that people who designate their spouses as beneficiaries of insurance policies, pension plans, and other investments typically leave those persons as named beneficiaries after divorces only because they forget to change those policies or because they believe that courts will enforce freely-negotiated, voluntarily-signed divorce-decree property settlements. The Fifth Circuit's August 15, 2007 opinion flies in the face of that common sense experience and legislative wisdom.

As a result of this unnecessary state versus federal conflict, an attorney, plan-administrator, or judge in Texas will not be able to predict the outcome of an ERISA pension plan dispute regarding waiver in a divorce decree.

The first foreseeable result of this new federal versus state conflict is forum-shopping. Savvy Texas trial lawyers are certain to file declaratory judgment actions and interpleader suits in federal court if they want to supersede or negate voluntary divorce-decree waivers. Equally canny advocates are sure to file similar actions in state courts if they want to enforce freely-negotiated divorce court property settlement agreements. Clever clients represented by unscrupulous counsel may even execute divorce court waivers of pension plan proceeds with the intent to negate those agreements by filing federal court declaratory judgment actions, all for the purpose of using the Fifth Circuit's new *gotcha* clause to renegotiate their divorces salami-style, one slice of property at a time.

It takes little imagination to foresee the courtroom chaos that will ensue as spouses, family law attorneys, and trial judges try to disentangle Texas law. Should they follow the Texas Supreme Court's 2003 pro-waiver, Federal Common Law ruling, or adhere to the Fifth Circuit's anti-waiver, "QDRO is the *only* waiver" holding? And what of ERISA pension plan administrators in Texas? How will they make their fiduciary decisions? The Fifth Circuit's August 15, 2007 opinion augurs an era of uncertainty in negotiating, interpreting, and enforcing divorce-court property settlement agreements in Texas. This Court holds a federal solution to this seventeen-year-old federal problem: a writ of *certiorari*.

F. The new opinion conflicts with prior Fifth Circuit precedent, maximizing the prospects for intra-circuit confusion.

The August 15, 2007 Opinion conflicts with the Fifth Circuit's prior precedent by carving out an exception for ex-spouse cases involving QDROs. Citing *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), APP. 1 at 5, the panel reversed the summary judgment and stated that "[t]hose cases are inapposite" because they "concerned ERISA-governed life-insurance policies, which are "welfare plan[s]," as defined by 29 U.S.C. § 1002(1), holding that "ERISA's anti-alienation provision was *not* at issue."

The August 15, 2007 decision is at odds with the reasoning of previous Fifth Circuit cases concerning divorce-decree waivers where the circuit upheld divorce-decree waivers of a beneficiary's right to receive pension proceeds payable under an ERISA plan. *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1322-24 (5th Cir. 1994), *cert. denied*, 513 U.S. 1081 (1995) (a decedent's ex-wife and the beneficiary of an ERISA life-insurance plan, waived them through a divorce decree).

The Fifth Circuit's novel, split-the-difference opinion abandons *Brandon,* 18 F.3d at 598 and *Rhoades v. Casey,* 196 F.3d 592, 598 (5th Cir. 1999), where the circuit held that ERISA's "anti-alienation provision is not absolute." This shift in law will increase uncertainty among participants and beneficiaries and lead to more litigation extraordinarily expensive for heirs and estates.

Similarly, in *McGowan v. NJR Service Corp.*, the Third Circuit erred when it held that a beneficiary had not effectively waived her rights to her ex-husband's pension plan. In that strikingly similar decision, the Third Circuit opted not to recognize that ERISA's overriding policy objective is to protect participants and their beneficiaries. It further failed to consider the legislative history of ERISA and the development of the QJSA, which should have persuaded the court to apply the federal common law approach.

Here, as the Third Circuit did in *McGowan*, the Fifth Circuit has not only misinterpreted the ERISA statute, but also conferred an undeserved windfall on an ex-spouse to the detriment of a participant's estate. Rather than carrying out the fiduciary duties under ERISA by filing an interpleader or declaratory judgment action to determine the rightful recipients of the late William P. Kennedy's SIP account, the DuPont administrator – actually, a paralegal in his employ – did the *easy* but wrong thing, even after being placed on notice of the contending claims to the SIP proceeds. The August 15, 2007 panel ignored the plan administrator's fiduciary duties and focused, erroneously, on that administrator's convenience.

The resemblance of ERISA to the common law of trusts, the structure of the statute, and ERISA's silence on the issue of waiver should have led the court to determine that the federal common law approach applied. Instead, the court neglected to observe the common law and followed the minority approach.

Additionally, the Fifth Circuit erred in setting forth the policy grounds and case law it relied upon in denying the Estate Decedent Kennedy's SIP benefits. The Fifth Circuit should have recognized that this case differed from courts such as the Third Circuit which have traditionally followed the minority approach and that the facts here warranted the traditional common law approach. If the Fifth Circuit had applied the common law approach, the Estate would have received the SIP benefits that Decedent Kennedy would have reasonably expected his survivors and creditors to receive.

The District Court correctly interpreted ERISA and Federal Common Law when it entered a judgment in favor of the Estate for the amount of the SIP pension benefits DuPont erroneously paid to Ex-Wife Liv Kennedy rather than the Estate.

III. The Fifth Circuit erred in applying a plan-deferential five-factor abuse of discretion test for awarding attorney's fees that penalizes prevailing parties in ERISA cases - an issue of first impression for this Court.

This Court has never specified the standard governing the award of ERISA attorney's fees under 29 U.S.C. § 1132(g)(1). That law states that "[i]n any action . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." The legislative history is sparse. *See* H.R. CONF. REP. NO. 93-1280 (1973), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5107; H.R. REP. NO. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 2659. Courts lament the absence of legislative and Supreme Court guidance when awarding ERISA fees. *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1303 (6th Cir. 1991).

A. The five-factor test.

Confronted with a standard-less statute, circuit courts have created tests in ERISA fee decisions, including the five-factor test applied below, which focuses on (1) culpability or bad faith; (2) ability to pay; (3) deterrent effect; (4) benefit to all plan-participants and beneficiaries; and (5) merits of party positions. APP. 1 at 11-14 (citing *Dial v. NFL Player Supplemental Disability Plan,* 174 F.3d 606, 613 (5th Cir. 1999)). That test began in *Eaves v. Penn,* 587 F.2d 453, 465 (10th Cir. 1978), when the Tenth Circuit listed five factors to be considered in attorney's fee decisions – a test criticized as one "without citation and apparently from thin air." David E. Gordon & Robert N. Eccles, *ERISA Attorney's Fees: An Unpredictable Situation,* 10 INSIDE LITIG. 17, 17 (1992).

B. The circuit split.

The First, Second, Third, Fifth, Sixth, and Tenth Circuits nevertheless apply the *Eaves* test. *See* Jessica Michelle Westbrook, *Resolving the Dispute over When Attorney's Fees Should Be Awarded under ERISA in Two Words: Plaintiff Prevails,* 53 ALA. L. REV. 1311, 1314-15 (Summer 2002).

In *Bittner v. Sadoff & Rudoy Industries, Inc.,* 728 F.2d 820 (7th Cir. 1984), Judge Posner noted but did not apply the five-factor test, but instead looked to the Equal Access to Justice Act for guidance about the word "discretion" in a manner that weighed review of discretion in favor of a prevailing party. *Id.* at 826-830.

In marked contrast, the Eighth Circuit in *Landro v. Glendinning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980) and the Ninth Circuit in *Smith v. CMTA-IAM Pension Trust,* 746 F.2d 587, 590 (9th Cir. 1984) have incorporated the logic of the Fees Award Act, 45 U.S.C. § 1988, into their review of ERISA fee awards, reasoning that a prevailing plan beneficiary "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."

C. A just solution to the circuit split consistent with ERISA's goals.

This Court should adopt the Eighth and Ninth Circuits' Attorney Fee Act analysis under 28 U.S.C. § 1988 in Civil Rights Act cases, where this Court has ruled that prevailing plaintiffs are ordinarily entitled to recover their attorney's fees unless some extraordinary circumstances make a fee award unjust. *Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983).

The *Eckerhart* standard is more consistent with ERISA's purposes than the defendant-deferential, five-factor test here. *Tingey v. Pixley-Richards West, Inc.,* 958 F.2d 908, 909 (9th Cir. 1992); John H. Fanning, *The Need for a Mandatory Award of Attorney's Fees for Prevailing Plaintiffs in ERISA Benefits Cases,* 41 CATHOLIC U. L. REV. 871 (Summer 2002); Westbrook, 53 ALA. L. REV. at 1320-26.

In furtherance of ERISA's primary objective of protecting participants and beneficiaries, the Estate should recover the fees DuPont has already forced the Estate to incur, and the money DuPont will subsequently cause the Estate to expend on appeal. ERISA is remedial legislation enacted primarily to promote the interests of employees and their beneficiaries, and not to serve as a shield for plan-managers' incompetence.

In this case, DuPont could have easily protected its own interests and ensured that the late William P. Kennedy's SIP proceeds went to the rightful owner simply by depositing those proceeds into the registry of a court in a run-of-the-mill interpleader action.

Otherwise, the failure to reimburse reasonable and necessary fees will substantially reduce participant-heir's recovery and encourage costly, unreasonable defenses of corporate error, where plans use their superior financial resources to wage successful wars of attrition against under-funded opponents. *See, e.g., Salovaara v. Eckert*, 222 F.3d 19, 28 (2nd Cir. 2000); *Meredith v. Navistar Int'l Transp. Corp.*, 935 F.2d 124, 128 (7th Cir. 1991).

In short, a failure to award attorney's fees to prevailing plaintiffs representing pension plan participants, their heirs, and their beneficiaries undermines ERISA's primary purpose, as analyzed above, of protecting those very parties.

Another reason to shift over to a Section 1988 model of fee awards is to encourage attorneys to represent participants, their heirs, and their beneficiaries in the extraordinarily intricate and remarkably risky world of ERISA litigation, where the benefits recovered are modest and the payout often protracted. *See, e.g., Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1302 (6th Cir. 1991) (where amici curiae parties urged the court to adopt a "private attorney general" theory of fee shifting because employees have great difficulty finding attorneys willing to handle these cases).

ERISA's attorney's fees statute should be liberally construed to further the statute's remedial purpose, as in *Chambliss v. Masters, Mates, & Pilots Pension Plan*, 815 F.2d 869, 872 (2nd Cir. 1999) and *McElwaine v. U.S. West, Inc.*, 176 F.3d 1167, 1172 (9th Cir. 1999), rather than in a fashion that punishes prevailing heirs of participants.

Accordingly, this Court should grant a writ of *certiorari* to correct the error below, resolve the conflict among the circuits and state supreme courts, and establish a just, uniform, federal common law rule of decision for these recurring and important ERISA issues, including the unresolved issue of the proper interrelationship of ERISA and federal common law.

CONCLUSION

Petitioner Kari Ellen Kennedy, Independent Executrix of the Estate of William Patrick Kennedy, Deceased, requests this Court to GRANT its Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and order full briefing on the merits.

Respectfully submitted,

STACY L. KELLY
Counsel of Record
ERIN E. EGGLESTON
MACINTYRE & MCCULLOCH, LLP
3900 Essex, Ste. 220
Houston, Texas 77027
(713) 572-2900
(713) 572-2902 (fax)

DAVID A. FURLOW
KEVIN PENNELL
THOMPSON & KNIGHT LLP
333 Clay St., Ste. 3300
Houston, Texas 77002
(713) 654-8111
(832) 397-8253 (fax)

Attorneys for Petitioner Kari Ellen Kennedy

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