

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.*, amended by the Retirement Equity Act of 1984 (REA), I.R.C. § 414(p), is a federal law that governs disposition of qualified retirement plan benefits upon the death of a participant and at divorce. ERISA also governs employee welfare benefits, such as employer-sponsored life insurance. ERISA is implicated whenever a marital agreement addresses these benefits. Here are the key concepts a lawyer must understand to effectively handle a premarital agreement that involves ERISA retirement benefits or life insurance.

Spousal rights under ERISA retirement plan

ERISA mandates benefits for a surviving spouse in the absence of an effective waiver:

- A qualified defined benefit retirement plan must pay a survivor annuity to the spouse of a participant who dies before the annuity starting date, the qualified preretirement survivor annuity (QPSA).
- A participant in a defined benefit plan who is married on the date of his or her retirement must elect a qualified joint and survivor annuity (QJSA) form of benefit.
- Defined contribution plans must pay a married participant's accrued benefit to his or her surviving spouse. In the absence of an effective waiver, a divorcing spouse has certain rights:



MAKING PENSION PROMISES IN A PRENUP: THE IMPACT OF ERISA

BY LINDA J. RAVDIN

- A state divorce court may award all or a portion of the participant's plan benefits to the spouse (the Alternate Payee or AP) as a division of property. To get direct payment from the plan to the AP, the order must be a Qualified Domestic Relations Order (QDRO). ERISA mandates that the plan honor the QDRO.
- A state divorce court may use a QDRO to grant a divorcing spouse the survivor annuity or death benefits under the plan. ERISA mandates that the plan honor the QDRO.

Waiver of survivor/ death benefits

ERISA does not permit a premarital waiver of a survivor annuity or lump-sum death benefit under a qualified plan. If a plan participant dies after the marriage while still a participant in the plan, the spouse will get these benefits despite a premarital agreement that purports to waive them. A spousal consent to a participant's waiver of the QPSA is not effective until the participant reaches age 35. A spousal consent to waiver of the QJSA is only effective if made within 90 days of the annuity starting date.

Additional steps are required after marriage to make a premarital agreement waiver effective. The premarital agreement should include an obligation on the part of the spouse to take these steps, and the participant should be advised about what he or she must do after marriage:

- The participant should obtain a consent form from the plan administrator for waiver of the QPSA or lump-sum death benefit and have the spouse

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execute it before a notary as soon as possible after the marriage or after the participant reaches his or her thirty-fifth birthday.

- The participant must file the consent with the plan administrator.
- The participant must file a beneficiary designation with the plan.
- The participant must repeat this process every time he or she takes a new job and participates in a new plan.
- The participant must obtain a new spousal consent and file it with the plan within 90 days of the annuity starting date.

Contract terms creating survivor rights

ERISA creates vested spousal rights to survivor benefits only as long as benefits remain in the plan. When a participant leaves a job or retires, he or she may roll over benefits in a defined contribution plan, such as a 401(k), to an IRA. Once benefits are out of the plan, the surviving spouse has no protected rights to them under ERISA. The IRA owner can name the beneficiary of his or her choice. ERISA also has nothing to say about what a married participant does with the plan benefits after retirement; ERISA does not prevent him or her from spending them. Therefore, a premarital agreement provision for a surviving spouse to be beneficiary of a specific plan account could be illusory.

Waiver of right to seek division at divorce

Parties to a premarital agreement can waive the right to claim a share of retirement benefits as part of a property division at divorce. Unlike survivor rights, ERISA does not create a vested spousal right to share retirement benefits at divorce; it merely permits a state divorce court to make an award under that state's marital property law. Litigants have tried to convince courts that ERISA

does not permit such a waiver on the theory that equitable distribution is a protected spousal right under ERISA, equal in status to the rights of a surviving spouse. Courts in seven states have rejected this argument; courts in other states have yet to rule.

Creation of spousal right to share benefits

Parties to a premarital agreement can provide for sharing retirement benefits at divorce. For the spouse to receive direct payment from the plan, the divorce court must enter a QDRO. Therefore, it is a good idea for the premarital agreement to provide for entry of a QDRO to carry out the agreed division.

Rights of same-sex spouse

The federal Defense of Marriage Act (DOMA) defines marriage for purposes of interpretation of federal statutes to exclude a same-sex married couple, even when their marriage is legal in the state where celebrated. Therefore, a divorcing same-sex spouse will not be able to obtain a QDRO for division of pension benefits that is enforceable against the plan. Same-sex spouses can provide by premarital agreement to share retirement benefits in the event of dissolution. However, they will need to carry out the division in some other fashion, such as a setoff against other assets or a cash payout from the participant to the former spouse. Similarly, a same-sex couple can have an agreement that obligates each to name the other as beneficiary of death benefits, but this obligation cannot be enforced against the plan.

Creation of surviving spouse right to life insurance

Parties may wish to provide for a surviving spouse to receive life insurance. ERISA is implicated if the agreement specifies an employer-sponsored plan. ERISA mandates that such life insurance be paid in

accordance with the beneficiary designation, even when the insured names a beneficiary in violation of a marital contract. Where a premarital agreement requires a participant to name the spouse as beneficiary, the spouse must take steps to protect his or her rights.

- Include in the agreement an express obligation to sign and file the appropriate beneficiary designation with the plan administrator.
- Determine if the plan will honor an irrevocable beneficiary designation and provide for such an irrevocable designation.
- Obtain consent to go directly to the plan administrator to verify that the beneficiary designation is in effect.
- Provide for alternative rights to other assets, for a claim against the estate, or for the right to revoke a waiver of the spousal elective share, to the extent necessary to make the nonparticipant whole.
- Advise the client that he or she may need a new beneficiary designation if the participant changes jobs.
- Advise the client that the life insurance coverage may end or reduce when the participant leaves the job or retires, or the plan may require the participant to elect to continue coverage at his or her own expense.
- Consider other alternatives, such as an individual policy of life insurance or a cash request, which may better protect the client's need for financial security.

As discussed below, a divorcing spouse may be able to obtain a QDRO providing for payment of life insurance. A QDRO is not available to secure these benefits in an ongoing marriage that ends in the death of the participant. The surviving spouse will, therefore, need other means of securing these benefits if the participant dies during the marriage.

Waiver of right to employer-sponsored life insurance

ERISA creates no vested spousal right to employer-sponsored life insurance. Therefore, ERISA is not an impediment to an effective waiver of such benefits in a premarital agreement. As discussed above, ERISA mandates that life insurance benefits be paid in accordance with the beneficiary designation on file with the plan. A plan may provide for a default beneficiary, often the spouse of a married participant, when the participant fails to name a beneficiary. Even when an agreement waives the spouse's claim

to these benefits, there are circumstances that could undo the participant's intent if he or she does not pay attention

- The participant may file a beneficiary designation naming the spouse, despite a contractual waiver, and fail to file a superseding designation when circumstances change, such as a separation or the birth of a child.
- The participant may fail to file a new beneficiary designation after the death of a prior spouse, leaving disposition to the default provisions of the plan.

■ The parties may sign a separation agreement with a waiver of rights to life insurance, but the participant may fail to file a new beneficiary designation with the plan.

■ The parties may divorce with a judgment that purports to divest the spouses of the right to life insurance, but the participant may fail to file a new beneficiary designation with the plan.

In these circumstances, ERISA mandates that the plan pay benefits to the spouse despite a contractual waiver. The beneficiary designation (or the default provision of the plan)

STATUTES, REGULATIONS, AND ERISA CASES

ERISA and the Retirement Equity Act

- Employee Retirement Income Security Act (ERISA) 29 U.S.C. § 1001, *et seq.*; key provisions are in sections 1055, 1056, 1104, 1144
- Retirement Equity Act of 1984, I.R.C. §§ 401, 414 (p), 417
- Treas. Reg. § 1.401(a)-13, *et seq.*

Premarital Waiver of Survivor/Death Benefits

- Treas. Reg. § 1.401(a)-20, Question 28
- *Hagwood v. Newton*, 282 F.3d 285 (4th Cir. 2002)
- *National Auto Dealers & Assoc. Retirement Trust v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996)
- *Hurwitz v. Sher*, 982 F.2d 778 (2d Cir. 1992), *cert. denied*, 508 U.S. 912 (1993)
- *Robins v. Geisel*, 666 F. Supp. 2d 463 (D. N. J. 2009)
- *Ford Motor Co. v. Ross*, 129 F. Supp. 2d 1070 (E.D. Mich. 2001)
- *Zinn v. Donaldson Company, Inc.*, 799 F. Supp. 69 (D. Minn. 1992)

Premarital Waiver of Right to Equitable Distribution of Retirement Benefits at Divorce

- *Savage-Keough v. Keough*, 373 N.J. Super. 198, 861 A.2d 131 (2004)
- *Sabad v. Fessenden*, 825 A.2d 682 (Pa. Super. Ct. 2003)
- *Stewart v. Stewart*, 141 N.C. App. 236, 541 S.E.2d 209 (2000)
- *Critchell v. Critchell*, 746 A.2d 282 (D.C. 2000)
- *Marriage of DiFatta*, 306 Ill. App. 3d 656, 714 N.E.2d 1092 (1999)
- *In re Marriage of Rahn*, 914 P.2d 463 (Colo. Ct. App. 1995)
- *Strong v. Dubin*, 75 A.D.3d 66, 901 N.Y.S.2d 214 (2010);
- *Moor-Jankowski v. Moor-Jankowski*, 222 A.D.2d 422, 634 N.Y.S.2d 728 (1995)

ERISA Preemption, Anti-alienation and Plan Documents Rules

- *Kennedy v. Plan Administrator, DuPont Savings and Investment Plan*, 129 S. Ct. 865, 172 L. Ed. 2d 662 (2005)
- *Boggs v. Boggs*, 520 U.S. 833, 117 S. Ct. 1754, 138 L. Ed. 2d 45 (1997)
- *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001)

Enforcement of Contractual Waiver of or Right to Benefits

- *Mattei v. Mattei*, 126 F.3d 794 (6th Cir. 1997)
- *Hess v. Wojcik-Hess*, 2010 U.S. Dist. Lexis 6168 (N.D. N.Y. Jan. 26, 2010)
- *Staelens v. Staelens*, 677 F. Supp. 2d 449 (D. Mass. 2010)
- *Robins v. Geisel*, 666 F. Supp. 2d 463 (D. N.J. 2009)
- *Met. Life Ins. Co. v. Cline*, 2007 U.S. Dist. Lexis 71367, 42 Emp. Ben. Cas. (BNA) 1284 (D.E.D. Wash. 2007)
- *Pruchno v. Pruchno*, 2004 Mich. App. Lexis 1875, 33 Emp. Ben. Cas. (BNA) 2721 (2004)
- *Ladov v. Mendelson*, 2008 U.S. Dist. Lexis 22557 (D.W.D. Pa. 2008) (Once husband's survivor benefits paid to wife, breach of contract and constructive trust claims under premarital agreement presented no federal question; case remanded to state court.)
- *Pardee v. Personal Representative, Estate of Pardee*, 112 P.3d 308 (Ok. Civ. App. 2004) (ERISA did not preempt former wife's breach of contract and constructive trust claims against estate and second wife where husband did not pay her half of retirement benefits at retirement.)

trumps the contractual waiver. The plan participant should be advised to keep his or her beneficiary designations up to date.

Former spouse right to employer-sponsored life insurance

When a premarital agreement provides for a surviving former spouse to be the beneficiary of employer-sponsored life insurance, the plan will nevertheless be bound to pay in accordance with plan documents. Therefore, if the participant names someone else, such as a subsequent spouse, the plan must pay that per-

son. Plan documents include a QDRO giving a divorced spouse the right to life insurance. When a premarital agreement provides for a life insurance obligation after divorce, counsel should consider including a provision for entry of a QDRO at divorce to preserve these benefits.

Enforcement issues

The best time to consider potential enforcement problems is at the drafting stage. Enforcement issues can arise when:

- A spouse refuses to sign a consent after marriage to permit the partic-

ipant to waive survivor or death benefits under an ERISA retirement plan, despite a contractual obligation to do so;

- After marriage, the participant fails to request the spouse to sign a consent to a waiver of death benefits under a retirement plan and then dies;
- Parties divorce with a separation agreement that waives the spouse's survivor rights or his/her right to life insurance, but the participant does not file a change-of-beneficiary form with the plan administrator and then dies;
- The surviving spouse does not receive a retirement plan death benefit or employer-sponsored life insurance proceeds promised in a premarital agreement.

In considering a potential enforcement issue, it is important to distinguish between a remedy against the plan itself and a general contract remedy—e.g., specific performance; money damages; constructive trust on benefits after they are paid out; rescission of the contract—that the claimant may be able to pursue against the other party or his or her estate. Enforcement against the plan is greatly limited by ERISA. ERISA preempts all state laws that conflict with ERISA's mandates.

Kennedy v. Plan Administrator, DuPont Savings and Investment Plan, 129 S. Ct. 865, 172 L. Ed. 2d 662 (2009), laid to rest any doubt that ERISA, by virtue of its preemption provision, requires a plan to pay benefits to the person or persons entitled thereto in accordance with plan documents, even when a plan document, such as a beneficiary designation, contradicts the terms of a contract or a court order that is not a QDRO. The *Kennedy* divorce decree expressly divested the wife of survivor benefits under the husband's retirement plan, but he failed to file a new beneficiary designation and died. DuPont paid the benefits to her. The Supreme Court held that ERISA



IRAs

- I.R.C. § 408(a), (e)(1)
- *Charles Schwab & Co. Inc. v. Debickero*, 593 F.3d 916 (9th Cir. 2010) (Surviving spouse has no right to ERISA plan benefits rolled over to IRA.)

Other Retirement Benefits Cases

- *Kinsley v. Kinsley*, 2005 Va. Cir. Lexis 50 (June 8, 2005) (Premarital agreement giving wife right to survivor benefits under his 401(k) did not preclude husband from spending account assets for living expenses.)
- *Owens v. Automotive Machinists Pension Trust*, 551 F.3d 1138 (9th Cir. 2009) (Woman was entitled to a QDRO for a share of man's pension benefits directly from the plan to carry out equitable division of benefits at end of 30-year quasi-marital relationship under Washington case law affording equitable property rights to unmarried former cohabitants.)

Employer-Sponsored Life Insurance

- *Metropolitan Life Ins. Co. v. Cline*, 2007 U.S. Dist. Lexis 71367 (E.D. Wash. Sept. 26, 2007)
- *Cent. States v. Howell*, 227 F.3d 672 (6th Cir. 2000)
- *Sweebe v. Sweebe*, 474 Mich. 151, 712 N.W.2d 708 (2006)
- *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000)
- *Metropolitan Life Ins. Co. v. Pettit*, 164 F.3d 857 (4th Cir. 1998)
- *Metropolitan Life Ins. Co. v. Marsh*, 119 F.3d 415 (6th Cir. 1997)
- *Metropolitan Life Ins. Co. v. Wheaton*, 42 F.3d 1080 (7th Cir. 1994)
- *Carland v. Metropolitan Life Ins. Co.*, 935 F.2d 1114 (10th Cir. 1991)
- *Metropolitan Life Ins. Co. v. Hanson*, 2009 D.N.H. 146, 2009 U.S. Dist. Lexis 92044 (D.N.H. Oct. 1, 2009) (unpublished)
- *Cent. States v. Howell*, 227 F.3d 672 (6th Cir. 2000); *Metropolitan Life Ins. Co. v. Gulino*, 2009 U.S. Dist. Lexis 50901, 47 Emp. Ben. Cas. (BNA) 1236 (W.D. Wash. June 4, 2009)
- *Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001)

preempted the state court judgment that purported to divest the wife of her survivor rights. Rather, ERISA's mandate that benefits be paid in accordance with the beneficiary designation superseded the conflicting state law judgment.

The availability of a state law remedy to enforce a breach-of-contract claim against a spouse who refuses to sign a consent or who received retirement benefits or life insurance in violation of a contract is unresolved at this time. One school of thought asserts that ERISA's preemption rule preempts all state contract and quasi-contract remedies. The underlying principle is that Congress intended surviving spouses to have the financial security afforded by ERISA's protected spousal rights. The other school of thought says that ERISA's preemption

rule, coupled with the plan documents rule, is intended merely to allow for efficient administration of plans. Once benefits are paid out according to plan documents, ERISA has nothing to say about the resolution of a dispute among competing family members. In *Kennedy*, the Supreme Court acknowledged the question, but did not need to decide it.

Because of this uncertainty, counsel will need to advise a client that some aspects of the contract may come undone. Counsel also should consider provisions that may address noncompliance. For example, where other provisions are made for the surviving spouse in the parties' agreement, or in a will or other instrument, the agreement or instrument could require the spouse who elects to retain a survivor benefit contrary to the parties' agree-

ment to forfeit these other rights. When an agreement provides for a spouse to receive a stated percentage of a deceased spouse's estate, the agreement can provide that the survivor benefits or life insurance be credited against it. Finally, as discussed above, each party must be vigilant to protect his or her rights under the contract to the extent ERISA allows.



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Law on premarital agreements, is the author of two other treatises on the subject, and is a member of the section's Publication Development Board.