

ERISA Does Not Preclude Actions to Enforce Contractual Waivers of Benefits

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The failure to obtain a spousal waiver of rights in a pension, 401(k) or 403(b) plan following a remarriage, or failing to change a beneficiary designation following a life event, such as death or divorce, has become an all too common occurrence in this fast-changing world.

When a spouse with benefits subject to the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) (“plan benefits”) dies, it is often discovered that an unintended beneficiary is the actual beneficiary, albeit a surviving spouse who waived the right to receive those benefits as part of a prenuptial agreement, or a former spouse, who is still listed as the primary beneficiary.¹ In the context of a subsequent marriage, perhaps the subsequent spouse waived his or her rights in a prenuptial agreement to pass the deceased spouse’s plan benefits to the deceased spouse’s children from a previous marriage or to be able to pass the benefits pursuant to some other estate planning vehicle, such as a trust. Regardless, the failure to obtain and provide an ERISA waiver to the plan administrator can pit a stepparent against the stepchildren or others in contentious litigation.

Section 205 of ERISA (29 U.S.C. §1055) provides that absent an express written waiver, a plan participant’s surviving spouse is the beneficiary of a pension, 401(k) or 403(b) plan notwithstanding any contrary beneficiary designation of record. A waiver of rights in a prenuptial agreement alone does not meet the strict ERISA requirements to constitute a valid spousal waiver because the surviving spouse was not a spouse at the time of the prenuptial agreement’s execution. See, e.g., *Hagwood v. Newton*, 282 F.3d 285 (4th Cir. 2002). Indeed, prenuptial agreements cannot constitute a valid spousal waiver under ERISA to change the beneficiary designation before distribution. See e.g., *Borisch v. Treat All Metals, Inc.*, 21 F. Supp. 2d 890 (E.D. Wis. 1998) (finding a prenuptial agreement signed before marriage failed to constitute spousal waiver to supplant wife as the statutory beneficiary under the plan before distribution of benefits); *Boulet v. Fluor Corp.*, CIV.A. H-05-0105, 2005 WL 2860993 (S.D. Tex. Oct. 31, 2005) (examining spousal waivers under ERISA and how an individual can designate a non-spousal beneficiary before distribution); *Zinn v. Donaldson Co., Inc.*, 799 F.Supp. 69 (D. Minn. 1992) (finding no spousal waiver and refusing to order the spouse to execute a valid consent form). Conversely, a similar waiver in a postnuptial agreement, i.e., an agreement signed after the marriage, may in some circumstances constitute a valid waiver for ERISA purposes if it conforms to the plan terms regarding such waivers.

In representing the “disappointed” intended beneficiaries of a plan benefit, the interesting issues are: (a) whether a state law breach of contract action by the intended beneficiaries is barred by ERISA, or (b) if the waiver in the prenuptial agreement requires the surviving spouse to turn over the benefits, once received, to the intended beneficiaries as third-party beneficiaries of the prenuptial agreement. Under current Third Circuit precedent as well as Pennsylvania contract law, and by analogy to an ex-spouse waiving ERISA benefits as part of a divorce settlement, a contract governed by Pennsylvania law will control the ultimate delivery of the retirement benefits after the benefits are first paid in accordance with ERISA to the unintended beneficiary because of the lack of an ERISA-required waiver.

1. ERISA does not preempt third-party beneficiaries from enforcing their contractual rights and a court’s ability to direct an unintended beneficiary to distribute payments received pursuant to ERISA to the third-party beneficiaries.

This question has yet to be decided by the United States Supreme Court, but the United States Court of Appeals for the Third Circuit in *Kensinger v. URL Pharma*, 674 F.3d 131, 136 (3d Cir. 2012), examined on summary judgment “whether, once the plan proceeds are distributed to [an ex-spouse], the Estate may pursue a claim directly against her to enforce her waiver and recover the benefits.” *Id.* at 133. There, the decedent and Adele Kensinger had entered into a property settlement agreement corresponding with their divorce, whereby both parties agreed to waive all rights and interests to the other’s retirement interests. 674 F.3d at 132-33. The District Court concluded that “allowing the Estate to sue Adele would undermine ... ERISA’s ‘principal objectives,’” but the Third Circuit reversed. *Id.* The Third Circuit stated that “the plan documents rule promotes ‘simple administration, avoid[s] double liability, and ensur[es] that beneficiaries get what’s coming quickly, without the folderol essential under less-certain rules.’” *Id.* at 136 (emphasis in original). However, it held that:

[T]he goal of ensuring that beneficiaries “get what’s coming quickly” refers to the expeditious distribution of funds *from plan administrators*, not to some sort of rule providing continued shelter from contractual liability to beneficiaries who have *already received* plan proceeds. In this case, when URL pays the benefits to Adele, as it must, she will “get what’s coming” under the plan. **If, after distribution, her right to these funds is challenged because of her common law waiver, that challenge will be litigated as an ordinary con-**

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tract dispute. Accordingly, to the extent that ERISA is concerned with the expeditious payment of plan proceeds to beneficiaries, permitting suits against beneficiaries after benefits have been paid does not implicate any concern of expeditious payment or undermine any core objective of ERISA.

Id. at 136-37 (italics in original) (bold added). “Rather, a [post-distribution] suit against Adele would simply require a court to determine the rightful recipient of the plan proceeds **as a matter of contract law.**” *Id.* at 136 (emphasis added).

Both the Pennsylvania Supreme and Superior Courts have reached the same conclusion in the context of common law waivers. See *In re Estate of Easterday*, 209 A.3d 331, 346 (Pa. 2019) (holding that none of ERISA’s objectives “are implicated when an estate attempts to recover benefits that have already been distributed” because the consideration of a named beneficiary’s right to retain the benefits is “wholly beyond the scope of ERISA” and “ERISA does not preempt a state law breach of contract claim to recover funds that were paid pursuant to an ERISA-qualified employee benefit plan.”); *Estate of Harmon v. Harmon*, 1574 MDA 2019, 2020 WL 1490932, at *5 (Pa. Super. 2020) (“[c]ontrary to Harmon’s claim, ERISA does not relieve her of valid contractual obligations to the Decedent. ... After that payment was made, Harmon still had to honor the Agreement.”) (citing *Easterday*, 209 A.3d at 346; *Kensinger*, 674 F.3d at 136-37).

In *Estate of Harmon*, the Superior Court affirmed the trial court’s finding that, as a matter of law, an ex-wife of the decedent “had no right to the proceeds of the Decedent’s life insurance policy because she had contractually relinquished her primary beneficiary status.” *Id.* at *2, *4. The parties had agreed in their property settlement agreement to “waive and relinquish ‘any and all interest in the other[']s ... life insurance[.]’” *Id.* at *3. Harmon argued that under ERISA, “a designation as the primary beneficiary of a life insurance policy controls the ultimate distribution of the policy’s proceeds, no matter what contractual claim another party may have to them.” *Id.* at *5. She argued that ERISA bars a court from **ever** directing the distribution of such proceeds to anyone other than the primary beneficiary. *Id.* (emphasis added). The Pennsylvania Superior Court disagreed, stating: “[t]he flaw in Harmon’s reasoning is that it elevates a narrow statutory protection to an absolute and non-waivable right.” *Id.* It explained:

Contrary to Harmon’s claim, ERISA does not relieve her of valid contractual obligations to the Decedent. ERISA protected Harmon’s status as the primary beneficiary of a life insurance policy, making her the de facto recipient of proceeds despite her divorce from the

Decedent. **After that payment was made, Harmon still had to honor the Agreement.**

Id. (emphasis added). “As our Supreme Court has recently clarified, ERISA was never meant to be ‘some sort of rule providing continued shelter from contractual liability to beneficiaries who have already received plan proceeds.’” *Id.* (citing *Easterday*, 209 A.3d at 345) (quoting *Kensinger*, 674 F.3d at 36 (3d Cir. 2012)). Accordingly, once the policy funds were distributed to Harmon, ERISA no longer applied, and the Estate was entitled to enforce its contractual rights. *Id.* at *6.

Based upon this line of cases, although the surviving spouse must initially receive the benefits, ERISA does not relieve him or her from the contractual obligations to third party beneficiaries of the prenuptial agreement once those benefits have been received. If benefits are paid to the surviving spouse, the deceased spouse’s designated beneficiaries will have causes of action for declaratory judgment, breach of contract/anticipatory repudiation and constructive trust. Under those theories, a court should order that, pursuant to the prenuptial agreement, the surviving spouse holds the benefits in trust for and must pay those benefits as received over to the deceased spouse’s designated beneficiaries in accordance with Pennsylvania contractual law.

2. *Kensinger’s* conclusion and reasoning has been consistently applied in opinions nationwide, and state law claims arising post-distribution in no way frustrate or conflict with ERISA’s objectives.

A bevy of other federal and state court opinions expressly distinguish between an ERISA recipient’s right to *receive* benefits and their right to *retain* those benefits in the face of *post-distribution* state law claims. As the *Kensinger* court explained, its holding and distinction between obligations before and after the distribution of benefits finds support in a long line of state and federal cases throughout the country. See, e.g., *Sweebe v. Sweebe*, 712 N.W.2d 708, 712 (Mich. 2006) (“while a plan administrator must pay benefits to the named beneficiary as required by ERISA, this does not mean that the named beneficiary cannot waive her interest in retaining these proceeds.”); *Pardee v. Pardee*, 112 P.3d 308, 315-16 (Okla. Civ. App. 2004) (finding “pension plan funds were no longer entitled to ERISA protection once the plan funds were distributed.”); *Trucking Emps. of N. Jersey Welfare Fund v. Colville*, 16 F.3d 52, 55 (3d Cir. 1994) (“We have recognized ... a difference between funds remaining in the possession of an ERISA plan trustee and funds that have been distributed to the beneficiary.”); *DaimlerChry-*

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ler Corp. v. Cox, 447 F.3d 967, 974 (6th Cir. 2006) (“[t]his circuit, along with a majority of the other circuits, has held that once benefit payments have been disbursed to a beneficiary, creditors may encumber the proceeds.”); *Andochick v. Byrd*, 709 F.3d 296, 301 (4th Cir. 2013) (“[b]ecause we detect no conflict with either ERISA’s objectives or relevant Supreme Court precedent, we hold that ERISA does not preempt post-distribution suits against ERISA beneficiaries.”); *Hoult v. Hoult*, 373 F.3d 47, 54-55 (1st Cir. 2004) (“[t]he regulations promulgated by the Secretary of Treasury, who has the authority to implement §1056(d) of ERISA, further reinforce our interpretation ... [that] [o]nce benefits are distributed to the beneficiary, a creditor’s rights are enforceable against the *beneficiary*, not against the *plan* itself.”) (emphasis in original);ⁱⁱ *Martinez-Olson v. Estate of Olson*, 3D20-1301, 2021 WL 3889321 (Fla. Dist. Ct. App. Sept. 1, 2021) (“[w]e ... approve the growing body of case law supporting the Estate’s position that it can sue to recover the proceeds after they are distributed by the ERISA plan administrator pursuant to the plan documents.”). Likewise, the Pennsylvania Supreme Court noted that it “join[ed] a growing number of states in arriving at this conclusion,” i.e. that ERISA does not preempt a state law breach of contract claim after the distribution of funds. *Easterday*, 209 A.3d at 346, n.16 (citing cases).

Kensinger (along with numerous federal and state courts across the country) also directly distinguished the United States Supreme Court decision in *Boggs v. Boggs*, 520 U.S. 833 (1997) and its progeny as inapplicable in the context of state law claims arising after the distribution of benefits. See *Kensinger*, 674 F.3d at 138. The Third Circuit stated: “[t]he ‘interest’ at issue in *Boggs*, however, was an ‘interest in *undistributed* pension plan benefits.’ Here, of course, the question is whether the Estate can sue Adele *after* the funds have been distributed to her.” *Id.* (citing cases similarly distinguishing *Boggs*) (emphasis in original); see also *Andochick*, 709 F.3d at 300 (rejecting *Boggs* because it dealt with undistributed benefits). Though ERISA may preempt a third-party beneficiary’s state law claims *before* the distribution of benefits to a surviving spouse, ERISA provides no protection against a surviving spouse’s obligation under a prenuptial agreement irrevocably waiving and releasing the right to retain those benefits once they have been distributed. Once the benefits are distributed, the surviving spouse will be in breach of the prenuptial agreement if he or she retains them.

Similarly, numerous other decisions, for example, *National Auto Dealers & Assocs. Retirement Trust v. Arbeitman*, 89 F.3d 496, 502 (8th Cir. 1996), *Ford Motor Co. v. Ross*, 129 F. Supp. 2d 1070 (E.D. Mich. 2001), and *John Deere Deferred Sav. Plan For Wage Employees v. Propst*, 06-C-1235, 2007 WL 4594681 (E.D. Wis. Dec. 28, 2007) were decided before (and implicitly called into question by) the United States Supreme Court’s decision in

Kennedy v. Plan Administrator for DuPont Savings & Investment Plan, 555 U.S. 285 (2009). See *Kensinger*, 674 F.3d at 134. “[T]he [Kennedy] Court made clear that its holding did not address the question of whether the estate could have sued the ex-wife to recover the benefits after she received them from the plan administrator.” *Id.* (citation omitted).

Simply put, once the plan benefits have been paid to the surviving spouse, ERISA is no longer concerned nor are its objectives in any way infringed, and it does not “provide [surviving spouse] continued shelter from contractual liability” to third-party beneficiaries of the prenuptial agreement. See *Kensinger*, 674 F.3d at 136-37 (finding claims brought directly against the ERISA recipient after the benefits have been distributed in no way complicate ERISA’s purposes); see also *Easterday*, 209 A.3d at 346 (“[t]here is no indication that in drafting ERISA, Congress was concerned with the named beneficiary’s right to retain the benefits.”). As *Kensinger*, *Easterday*, *Harmon* and many other cases have held, ERISA does not provide a surviving spouse with a non-waivable right to retain the deceased spouse’s retirement benefits after they have been paid. In sum, the legal issue of retention of the benefits after payment is a matter of state, not federal, law.

3. These holdings are not limited to divorced spouses or prenuptial agreements.

Although many of the cases dealing with these issues naturally involve situations surrounding a divorce, no case has specifically so limited its holding. In fact, one Georgia state court decision on which *Kensinger* relies involved a second wife’s contractual waiver signed in a settlement agreement as part of an order of separate maintenance where the wife and the decedent had never actually divorced. See *Alcorn v. Appleton*, 708 S.E.2d 390, 392 (Ga. App. Ct. 2011), *aff’d*, 728 S.E.2d 549 (Ga. 2012) (“[t]his result is consistent with Georgia decisions concluding that ERISA does not preempt claims against funds already distributed from an ERISA plan.”). At least two other decisions have evaluated the issue outside of a divorce. See, e.g., *Joint Apprenticeship & Training Comm. of Local Union No. 36 v. Weddle*, 4:16 CV 1371 DDN, 2016 WL 6441601, at *9 (E.D. Mo. Nov. 1, 2016) (finding ERISA did not preempt breach of contract claims on a “scholarship loan agreement” once payments were received because, by then, “the calculation and administration of benefits [was] complete”); *Darsie v. Cone*, 5:10-CV-00154-KSF, 2010 WL 2923285, at *3 (E.D. Ky. July 22, 2010) (deciding for removal purposes that preemption under *Boggs* did not apply where surviving spouse sought post-distribution benefits from her late husband’s Estate pursuant to a prenuptial agreement). That the party claiming entitlement to the deceased spouse’s benefits was married to the decedent

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at the time of decedent's death and is the deceased spouse's surviving spouse is, thus, neither a relevant fact nor dispositive under the applicable legal authority.

Indeed, it is well-settled law that "[p]renuptial agreements are contracts, and, as such, should be evaluated under the same criteria as are applicable to other types of contracts." *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990) (citation omitted). They, therefore, are substantively no different from the agreements interpreted by numerous post-distribution ERISA cases. See, e.g., *Kensinger*, 674 F.3d at 132-33 (interpreting property settlement agreement); *Easterday*, 209 A.3d at 168 (same); *Pardee*, 112 P.3d at 310 (post-nuptial agreement); *Alcorn*, 708 S.E.2d at 391 (settlement agreement).

4. Conclusion.

Unless and until the United States Supreme Court squarely addresses this issue and decides otherwise — which is unlikely given the lack of a clear split among the lower courts — once a beneficiary receives a distribution of plan benefits under ERISA, ERISA's protections will not act as a shield from his or her contractual liability based on a waiver of the right to retain said benefits. A waiver or release of retirement interests in a contractual agreement should entitle the third-party beneficiary of such a waiver or release to pursue an action under state law for relief including a declaration that: (1) the recipient has no rights to retain any retirement interests paid to him or her under the employee benefit plan; and (2) if he or she has received or receives any such retirement interests, they hold them in a con-

structive trust for the benefit of the designated beneficiaries.

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Endnotes

ⁱNote that many qualified plans now provide that a former spouse's beneficiary rights are automatically terminated upon divorce.

ⁱⁱ29 U.S.C. §1056(d) is Section 206 of ERISA.